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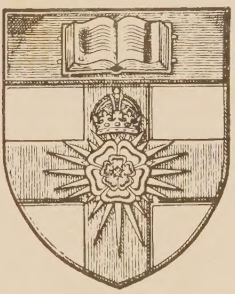

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1929.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1929.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1928.

Oct. 4. The Right Hon. Sir Arthur Channell, *sometime a Justice of His Majesty's High Court of Justice, King's Bench Division, died this day at Falmouth, aged* 89.

Nov. 30. The Hon. Sir Arthur Clavell Salter, *a Justice of His Majesty's High Court of Justice, King's Bench Division, died this day at his London residence, Queen's Gate Mansions, W.* 1, *aged* 69.

Dec. 14. The Hon. Sir Malcolm Martin Macnaghten, K.B.E., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of the Hon. Sir Arthur Clavell Salter.*

The Hon. Mr. Justice MacKinnon *was nominated to be ex-officio Commissioner for England under the Railway and Canal Traffic Act,* 1888.

1929.

Feb. 6. *This day the* Hon. Sir Thomas James Chesshyre Tomlin, *one of the Justices of His Majesty's High Court of Justice, Chancery Division, was, by His Majesty's command, sworn of His Majesty's most Honourable Privy Council, and took his place at the Board accordingly.*

Feb. 11. The Right Hon. Sir Thomas James Chesshyre Tomlin *was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act,* 1929, *and the dignity of a Baron for life was conferred upon him by the name, style and title of Baron Tomlin, of Ash, in the county of Kent.*

Arthur Fairfax Charles Corydon Luxmoore, Esq., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of the Right Hon. Sir T. J. C. Tomlin, and was afterwards knighted.*

Mar. 1. Sir George Rivers Lowndes, K.C.S.I., K.C., *was appointed to be a member of the Judicial Committee of the Privy Council under the provisions of the Appellate Jurisdiction Act,* 1929.

This day Sir George Rivers Lowndes, K.C.S.I., K.C., *was, by His Majesty's command, sworn of His Majesty's most Honourable Privy Council, and took his place at the Board accordingly.*

Mar. 9. The Right Hon. Robert Bannatyne, Viscount Finlay, *sometime Lord High Chancellor of Great Britain, a member of the Permanent Court of Arbitration and of the Court of International Justice, died this day at his London residence,* 37, *Phillimore Gardens, aged* 86.

Mar. 13. The Right Hon. Walter George Frank, Baron Phillimore, *G.B.E., some time a Lord Justice of Appeal, died this day at Cam House, Campden Hill, W., aged* 83.

Mar. 21. *This day* Sir Binod Chandra Mitter, Knight, *was, by His Majesty's command, sworn of His Majesty's most Honourable Privy Council, and took his place at the Board accordingly.*

Apr. 26. The Right Hon. Sir Binod Chandra Mitter, Knight, *was appointed to be a member of the Judicial Committee of the Privy Council under the provisions of the Appellate Jurisdiction Act,* 1929.

May 2. THE RIGHT HON. WILLIAM WATSON, *late Lord Advocate for Scotland, was appointed to be a Lord of Appeal in Ordinary, under the provisions of the Appellate Jurisdiction Act,* 1876, *in the place of the Right Hon. Thomas, Baron Shaw, who resigned the office. The dignity of a Baron for life was conferred upon the Right Hon. William Watson by the name, style and title of Baron Thankerton, of Thankerton, in the County of Lanark.*

May 8. *The dignity of a Baron of the United Kingdom was conferred upon the* RIGHT HON. THOMAS, BARON SHAW, *late a Lord of Appeal in Ordinary, by the name, style and title of Baron Craigmyle, of Craigmyle, in the County of Aberdeen.*

June 8. THE RIGHT HON. DOUGLAS MCGAREL, BARON HAILSHAM *having resigned the office, the Great Seal was this day delivered to the Right Hon. Sir John Sankey, G.B.E., whereupon the oath of office as Lord High Chancellor of Great Britain was, by His Majesty's command, administered to him, and he took his place at the Board accordingly.*

June 12. WILLIAM ALLEN JOWITT, ESQ., K.C., *was appointed to be His Majesty's Attorney-General in the place of Sir Thomas Walker Hobart Inskip, C.B.E., K.C., resigned, and was afterwards knighted.*

JAMES BENJAMIN MELVILLE, ESQ., K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Frank Boyd Merriman, O.B.E., K.C., resigned, and was afterwards knighted.*

SIR HENRY HERMAN SLESSER, KNIGHT, K.C., *was appointed to be one of the Lords Justices of Appeal in the place of the Right Hon. Sir John Sankey, G.B.E.*

June 21. *The dignity of a Baron of the United Kingdom was conferred upon the* RIGHT HON. SIR JOHN SANKEY, G.B.E., *Lord High Chancellor of Great Britain, by the name, style and title of Baron Sankey, of Moreton, in the County of Gloucester.*

July 5. *This day the* HON. SIR HENRY SLESSER, *a Lord Justice of Appeal, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

July 6. *The dignity of a Viscount of the United Kingdom was conferred upon the* RIGHT HON. DOUGLAS MCGAREL, BARON HAILSHAM, *lately Lord High Chancellor of Great Britain, by the name, style and title of Viscount Hailsham, of Hailsham, in the County of Sussex.*

Sept. 3. THE RIGHT HON. JOHN CHARLES, VISCOUNT MERSEY, *sometime President of the Probate, Divorce and Admiralty Division of the High Court of Justice, died this day at Littlehampton, aged* 89.

Oct. 14. CHRISTOPHER JOHN WICKENS FARWELL, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of the Hon. Sir John Meir Astbury, resigned, and was afterwards knighted.*

Oct. 14. THE HON. SIR MONTAGUE SHEARMAN *resigned the office of a Justice of His Majesty's High Court of Justice, King's Bench Division.*

Nov. 11. THE RIGHT HON. FRANK RUSSELL, *one of the Lords Justices of Appeal, was appointed to be a Lord of Appeal in Ordinary in the place of the Right Hon. Edward Henry, Baron Carson, resigned.*

THE HON. SIR MARK LEMON ROMER, *one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in the place of the Right Hon. Frank Russell.*

Nov. 15. CHARLES ALAN BENNETT, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of the Hon. Sir Mark Lemon Romer.*

Nov. 19. *The dignity of a Baron for life was conferred upon the* RIGHT HON. FRANK RUSSELL, *a Lord of Appeal in Ordinary, by the name, style and title of Baron Russell of Killowen, of Killowen, in the County of Down.*

ERRATA.

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662	footnote	Lord Blanesburgh	Lord Buckmaster.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)*
1928
July 23.

EGYPTIAN DELTA LAND AND INVESTMENT COMPANY, LIMITED . . . } APPELLANTS;

AND

TODD . . . . . RESPONDENT.

Revenue—Income Tax—Company incorporated in England—Registered Office in London—Business carried on Abroad—"Residence"—Liability of Company to Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Cases IV. and V.; All Schedules Rules, r.* 7.

Incorporation under the Companies Acts, with the attendant statutory obligations, does not in itself, as matter of law, constitute a British company a person residing in the United Kingdom within the meaning of the Income Tax Acts. It is merely a factor to be considered in determining residence, and is a matter for the Commissioners to decide.

It is settled by authority that the residence of a company, whether British or foreign, for income tax purposes is preponderantly if not exclusively determined by the place where its real business is carried on.

De Beers Consolidated Mines v. *Howe* [1906] A. C. 455 followed.

Swedish Central Ry. Co. v. *Thompson* [1925] A. C. 495 distinguished.

The Legislature has recognized the principle of *De Beers Consolidated*

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* *Present:* VISCOUNT SUMNER, LORD ATKINSON, LORD BUCKMASTER, and LORD WARRINGTON OF CLYFFE.

H. L. (E.)
1928
EGYPTIAN DELTA LAND AND INVESTMENT CO. v. TODD.

Mines v. *Howe* [1906] A. C. 455 in r. 7 of the All Schedules Rules in the Income Tax Act, 1918,

Accordingly, where a company incorporated in England transferred the whole of its business to Egypt and did nothing in this country beyond fulfilling its statutory requirements, and, on an appeal by the company against assessments to income tax under Sch. D in respect of the income derived from its foreign possessions, the Commissioners found that the company was not resident in England and discharged the assessments:—

Held, that the decision of the Commissioners ought not to be disturbed. Decision of the Court of Appeal [1928] 1 K. B. 152 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The question raised by the appeal was whether a company incorporated under the Companies Acts must necessarily be held to be resident in the United Kingdom, although it merely fulfilled the strict statutory requirements cast on it by those Acts, and its business was entirely controlled, managed, and carried on outside the United Kingdom.

The appellant company was incorporated in 1904 under the Companies Acts with a nominal capital of 500,000*l*. Its main objects were to acquire, hold, sell, let, or otherwise dispose of and deal in land situate in any district in Egypt served, or thereafter to be served, by railways belonging to the Egyptian Delta Light Railways, Ld., and to develop the resources of such lands in such ways as might seem capable of improving the property and undertaking of the company.

In 1907, in pursuance of special resolutions passed in that behalf, the business of the company was transferred to Cairo, and since that date had been controlled, managed, directed, and carried on entirely in Cairo. In 1907 all the London directors retired, and a new board of directors was appointed, consisting of four members all permanently resident in Cairo. Since 1907 there had been no meeting of directors in the United Kingdom; the secretary-general of the company resided in Egypt; the seal had been removed to and was kept in Egypt; the minute books and all books of account

(1) [1928] 1 K. B. 152.

had been removed to Egypt, and remained there; and the banking account of the company was with the National Bank of Egypt at Cairo. The company's former account with the London agency of the same bank had never been formally closed, but was only used by the London agency for debiting small disbursements, not exceeding 8*l.* or 9*l.* in any year, made by the agency on instructions from Egypt, no cheques being drawn on the account. The register of transfers was kept in Cairo, where transfers of shares were passed before being registered in London. Dividends were declared in and paid exclusively from Cairo. All meetings of the company were held in Cairo. The reports of the directors were sent out from Cairo, and there was a duplicate register of shareholders in Cairo.

To comply with the requirements of the Companies Acts there was a registered office of the company in London, at which the registers of members and directors and also a register of bearer warrants were kept. To meet those statutory requirements the company paid a fee to Mr. F. J. Horne, who carried on the business of secretary of public companies, and who provided them with a registered office at his address at Gresham House, Old Broad Street, where the name of the company, together with the names of five other companies, appeared on the door. For those services and for small incidental expenses Mr. Horne received 35*l.* per quarter, which he paid into an account in his own name with the London agency of the National Bank of Egypt. No separate room or part of a room was appropriated to the company. The Commissioners found that the London secretary's position was purely formal, and that he had no authority to do anything more than the law required the company to do here.

Assessments to income tax having been made on the company under Cases IV. and V. of Sch. D for the six tax years 1919–20 to 1924–25, in respect of interest arising from mortgages or rents arising from leases of land in Egypt, on the ground that the company was a person resident in the United Kingdom within that Schedule, the company appealed.

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The Commissioners, distinguishing *Swedish Central Ry. Co.* v. *Thompson* (1), found that the company was not resident in this country for the purposes of the Income Tax Acts, and allowed the appeal.

Rowlatt J. reversed the decision of the Commissioners, and the Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.) affirmed his judgment.

1928. Jan. 23, 24. *Macmillan K.C.* and *Hon. Geoffrey Lawrence K.C.* (with them *Bremner*) for the appellants. So far as the residence of a company is a question of fact the finding of the Commissioners that this company was not resident in the United Kingdom is not open to review; but their decision has been reversed by Rowlatt J. and by the Court of Appeal. The decision of the Court of Appeal that the registration of the company in this country under the Companies Acts, coupled with the compliance by the company with the statutory duties consequent thereon, is conclusive of the question of residence for income tax purposes is opposed to a long line of authorities. The operation of the Income Tax Acts is subject to this territorial limit, that either the person to be taxed (whether he be a British subject or not) must be resident in the United Kingdom, or the property from which the taxable income is derived must be situate in the United Kingdom; the underlying principle being that the liability is dependent on the benefit derived by the taxpayer from the laws of this country in respect of his person or property: *Colquhoun* v. *Brooks* (2); *Whitney* v. *Inland Revenue Commissioners*. (3) Putting aside the second alternative, which does not arise, it has long been settled that for income tax purposes the question of nationality is entirely irrelevant and that the sole question is residence: *Bradbury* v. *English Sewing Cotton Co.* (4) What then is the criterion of residence, as applied to a limited company? This is necessarily a question of analogy, because in the ordinary sense of the term a company cannot reside anywhere. It has

(1) [1925] A. C. 495.
(2) (1889) 14 App. Cas. 493, 504;
(3) [1926] A. C. 37, 54.
(4) [1923] A. C. 744, 764.

been settled by an unbroken series of authorities extending over half a century that the criterion of residence in the case of a company is the control and management of the business. A company resides where the control and management actually abides: *Attorney-General* v. *Alexander* (1); *Cesena Sulphur Co.* v. *Nicholson*; *Calcutta Jute Mills Co.* v. *The Same* (2); *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (3); *De Beers Consolidated Mines* v. *Howe* (4); *American Thread Co.* v. *Joyce* (5); *New Zealand Shipping Co.* v. *Thew* (6); *Bradbury* v. *English Sewing Cotton Co.* (7) In *Mitchell* v. *Egyptian Hotels* (8) no question of residence arose; the residence of the company was admittedly in this country. It follows from these authorities that registration, like the birth of an individual, is not conclusive of residence, but is merely a circumstance to be taken into account, and this has been laid down in terms by Huddleston B. in *Cesena Sulphur Co.* v. *Nicholson* (2); by Lord Loreburn in *De Beers Consolidated Mines* v. *Howe* (4); by Lord Buckmaster in *New Zealand Shipping Co.* v. *Thew* (6); and by Lord Shaw and Lord Wrenbury in *Bradbury* v. *English Sewing Cotton Co.* (7) In no case has the argument that registration necessarily imports residence been accepted. It may, however, be said that, though registration per se may not be conclusive, registration coupled with fulfilment of the requirements imposed by the Companies Acts as a consequence of registration is conclusive. But the judges, in saying that registration is not conclusive, must have had in mind that registration involved the fulfilment of certain statutory duties. If registration or registration with its attendant duties were conclusive, it was unnecessary to consider any question of control and management, and the whole of the reasoning in the *Cesena Sulphur Co.'s* case (2) was waste labour. Then it is said that, assuming that the ordinary test is control and management, a company, like an individual, may have more than one residence. This has been decided

(1) (1874) L. R. 10 Ex. 20.
(2) (1876) 1 Ex. D. 428, 453.
(3) [1896] A. C. 31, 38, 39.
(4) [1906] A. C. 455, 458.
(5) (1913) 6 Tax Cas. 163, 165.
(6) (1922) 8 Tax Cas. 208, 229.
(7) [1923] A. C. 744, 754, 755, 765.
(8) [1915] A. C. 1022.

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in the case of a natural person in *Cooper* v. *Cadwalader* (1), and in the case of an artificial person in *Swedish Central Ry. Co.* v. *Thompson.* (2) There is, however, no ground for applying different tests to different residences, the same test must be applied in all cases. That test has been laid down by this House over and over again, and it cannot be maintained that the decision of the majority of their Lordships in the *Swedish Ry. Co.'s* case intended to modify that rule. That case is distinguishable from the present in the finding of the Commissioners, who came to the conclusion that the company was a person residing in the United Kingdom. Further, the Lord Chancellor accepts the law as laid down by Lord Loreburn in the *De Beers* case, but says that "the central management and control of a company may be divided and it may 'keep house and do business' in more than one place; and if so it may have more than one residence." It is not there said that registration alone, or registration coupled with the compliance of the requirements of the Companies Acts consequent thereon, is sufficient proof of residence, but the point is kept open. On this view of the decision, and on this view alone, all the authorities fall into line.

[They also referred to r. 12 of the Rules applicable to Cases I. and II. of Sch. D in the Income Tax Act, 1918, and to the Finance Act, 1920, ss. 52–56.]

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. It is not true to say of the *Swedish Ry. Co.'s* case (2) that it merely applied the *De Beers* test to the special facts of that case. There has never yet been a case where it has been held that a company incorporated in England under the Companies Acts is not resident in this country for income tax purposes or for any purpose. It is only by virtue of the creation of the company under our law that it has any existence at all. Of the numerous cases which deal with residence as applied to a company there is only one where the company was English—namely, the *Cesena Co.'s* case. (3)

(1) (1904) 5 Tax. Cas. 101 (2) [1925] A. C. 495.
(3) 1 Ex. D. 428, 445.

The others were all cases of foreign companies. In the *Cesena Co.'s* case there existed a series of circumstances all of which concurred. The incorporation of the company, the registered office and the management and control were all in this country, and all those circumstances were taken into account by Kelly C.B. in determining the question of residence. After leaving open the question whether a company can have more than one residence, he says: "a joint stock company resides where its place of incorporation is, where the meetings of the whole company, or those who represent it are held, and where its governing body meets in bodily presence for the purposes of the company." He does not decide that the seat of control is the sole test. The Crown's contention is that there were two rules, both of which applied and led to the same result. Huddleston B., no doubt, says that the mere fact of registration is not sufficient, but he is far from saying that the English law does not require that a company incorporated under the Companies Acts shall have a residence here. *Attorney-General* v. *Alexander* (1) was a case of a foreign company, and therefore does not decide that the residence of an English company depends exclusively on the test of the seat of control. *De Beers Consolidated Mines* v. *Howe* (2) was also a case of a foreign company. This House did not there decide that the place of registration might not be a place of residence if there were statutory requirements to be complied with as a consequence of registration. *American Thread Co.* v. *Joyce* (3) was again a case of a foreign company. In that case Buckley L.J. suggests that the place of the incorporation of a company is prima facie its place of residence and also that a company may have more than one place of residence. Again in the *Egyptian Hotels* Case (4) he treats incorporation in the United Kingdom as proof that a company is resident here. *New Zealand Shipping Co.* v. *Thew* (5) was again a case of a foreign company. It was there held that there was evidence to support the finding of the Commissioners that

(1) L. R. 10 Ex. 20.
(2) [1906] A. C. 455.
(3) 6 Tax Cas. 1, 31, 163.
(4) [1914] 3 K. B. 118, 132.
(5) 8 Tax Cas. 208.

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the seat of control was in this country. But Lord Buckmaster cannot have intended that that should be the sole test, otherwise that decision would be inconsistent with the *Swedish Ry. Co.'s* case. *Bradbury* v. *English Sewing Cotton Co.* (1) dealt with the locality of possessions ; it is not an authority upon residence. The *Swedish Co.'s* case (2) decides two things : first, that a company may have more than one place of residence and, secondly, that control and management is not the sole test of residence. In that case it was found by the Commissioners that the real control and management of the business was in Sweden. Only formal administrative business was done in London. No doubt, more was done there than in the present case, but there was nothing amounting to control and management. The Lord Chancellor, speaking of the *De Beers* case (3), says that the effect of that decision is "that when the central management and control of a company abides in a particular place, the company is held for purposes of income tax to have a residence in that place ; but it does not follow that it cannot have a residence elsewhere." The subsequent passage relied on by the appellants is added merely by way of illustration. Lord Dunedin expressly rejects the argument that control and management is the sole test. That case cannot be relied on by the Crown as a direct decision on the question at issue in the present case—namely, that registration in this country, coupled with compliance with the requirements of the Companies Acts, as the result of registration, is sufficient evidence of residence here ; but the point is kept open. The Crown's contention receives some support from the observations of Buckley L.J. above quoted, from the remarks of Channell J. in *Goerz & Co.* v. *Bell* (4), and from a dictum of Scrutton L.J. in the *Bradbury Case.* (5) A residence of a company is a place where it can constantly be found. The Legislature has made it a condition of registration that the company shall have a place in this country where it can always

(1) [1923] A. C. 744.
(2) [1925] A. C. 495, 501.
(3) [1906] A. C. 455.
(4) [1904] 2 K. B. 136, 146–7.
(5) [1922] 2 K. B. 569, 582.

be found by people who want to ascertain the constitution of the company. The registered office is not a mere place of address; it is the place where the company itself is to be found, and is vital to the existence of the company. It is not contended that registration in all cases shows that the company must have a residence in the country where it is registered, but the case for the Crown is based upon the requirements prescribed by the Companies Acts.

[They referred to ss. 30, 37, 62, 63, 75, 93, 100, 102, 116 and 131 of the Companies (Consolidation) Act, 1908.]

Macmillan K.C. replied.

The House subsequently ordered this appeal to be set down for further argument by one counsel only on each side upon the effect of r. 7 of the General Rules applicable to All Schedules in the Income Tax Act, 1918, upon the respondent's argument that the registration of a company in this country under the Companies Acts, with the statutory obligations involved in registration, necessarily implied that the company must have a residence here.

Rule 7 of the All Schedules Rules commences as follows: "Where a non-resident person, not being a British subject or a British, Indian, Dominion, or Colonial firm or company, or branch thereof, carries on business with a resident person, etc."

1928. June 12. LORD BUCKMASTER said that, as the opening words of the rule appeared prima facie to be adverse to the contention of the Crown, their Lordships would hear the Attorney-General first.

Sir Thomas Inskip A.-G. for the respondent. The opening words of r. 7 are not inconsistent with the contention of the Crown that registration under the Companies Acts, with the statutory obligations imposed upon a company by virtue of its registration, imports that the company is resident in this country. No doubt the exception in the rule contemplates that there may be British companies which are non-resident, but the word "company," as used in the exception, is wide enough to include every kind of company, whether

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incorporated under the Companies Acts or not so incorporated —namely, companies incorporated by Royal Charter or by some special statute. As the exception refers only to non-resident companies it cannot refer to companies which by law are necessarily resident here. That still leaves certain classes of companies upon which the exception can operate.

Macmillan K.C. for the appellants. In 1915, when this rule first appeared as s. 31, sub-s. 3, of the Finance (No. 2) Act, 1915, the ruling law was the law laid down in the *De Beers* case. The framers of the rule must have contemplated that control and management was the test of residence, and the rule must be interpreted on that basis. The rule assumes that there may be British companies which are non-resident. The Attorney-General accepts that, but says that the exception applies only to companies incorporated by charter or by some special Act—a very limited class. It is an odd thing that, while all firms are covered, only a special class of companies is covered. The burden is on the Attorney-General to show that, in the case of companies only, the exception is confined to a very limited class, and that burden he has failed to discharge.

Sir Thomas Inskip A.-G. replied.

The House took time for consideration.

1928. July 23. VISCOUNT SUMNER. My Lords, the Commissioners' finding, upon evidence which was sufficient to support it, was in favour of the subjects. It can only be challenged upon some ground of law sufficient to enable the Inland Revenue to succeed, but which they overlooked. Accordingly the respondent contends, and necessarily so, that incorporation under the Companies (Consolidation) Act, with the attendant statutory obligations, in itself and as matter of law makes a British company a "person resident in the United Kingdom" within the Income Tax Act, 1918. If this had been merely a factor to be considered along with others relating to the company's affairs, it would have been, like other questions of fact and of degree, a matter for the

Commissioners, and their finding in favour of the appellants would be conclusive.

The word "resident," used for over a century in these taxing Acts, was introduced long before limited liability was freely recognized by the law, but in and before 1853 all incorporations were brought under charge. None existed with the precise forms of incorporation and obligation, enacted for companies with limited liability since 1862. The words "a person resident" were, of course, used of incorporated persons without any reference to the provisions subsequently enacted.

My Lords, I think it follows that the first question here is the interpretation of the Companies (Consolidation) Act, 1908, and not that of the Income Tax Acts. Only if its provisions make an English limited liability company resident in England does any further question arise. Now the Companies (Consolidation) Act says nothing about the "residence" of the companies incorporated under it and, as regards income tax, it was passed alio intuitu. The question is not "Where does such a company reside, if it must reside somewhere?" but "Has the Act of 1908 constituted for companies any residence at all?"—a thing not in any case analogous to the residence of an individual. Residence is not inherent in a company in the nature of things, and residence for the purpose of taxation is matter for express legislation.

Furthermore, down even to 1853, most taxpayers were natural persons. As to number it is so still, though whether they now pay more than companies do I know not. Throughout the Income Tax Acts "resident," with its various qualifications "actually," "ordinarily," "occasionally," "temporarily," and so forth, is used in a sense in every way appropriate to natural persons, but only artificially applicable to incorporated persons, and never really appropriate. Indeed, I think that "a person ordinarily resident in the United Kingdom," as used in the Income Tax Act, is so inappropriate a term for a person, albeit an artificial one, who is always and by law immovably resident in the United Kingdom, that it cannot be sustained; and so the Legislature

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itself seems to have thought, for I find in s. 39 of the Finance (No. 2) Act, 1915 (a cognate enactment to the Income Tax Act), the provision that "the . . . . businesses, to which this part of this Act applies, are all . . . . businesses . . . . carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom," which is the formula thought necessary to include the English businesses of English companies and to bring them under excess profits duty.

At first, perhaps, the Courts might have said that, as a corporation could not "reside" anywhere in any true sense, they must leave it to the Legislature to enact residence in an artificial sense, but they felt bound to make the Acts work as they found them and arrived at a compromise, under which certain propositions, I think, are now well settled. The word "resident," it is laid down, has to be applied to artificial persons by analogy from natural persons. With these, residence depends on personal facts. Place of birth, nationality and allegiance are not the tests, nor is domicil, except in a sense that makes it barely distinguishable from residence. Voluntary choice and habitual and repeated action are mainly material, such as making a home, keeping an establishment, pursuing a settled object in or at a particular place. A man can change his residence at will, except that a certain duration of time or fixity of decision is requisite, and, but for the peculiar cases of a convict in gaol or a lunatic lawfully detained in a madhouse, I do not think that residence is ever determined for a natural person simply by the law. Accordingly, under the decisions, as well as in principle, "resident" is a term exceedingly unsuited to describe a statutory "person," which can never be non-resident, because, by the law of its being, it is a fixture. The analogy that is really possible between a natural person and a company is that of carrying on business at a place, great or small, and in my opinion, for the purpose of income tax, both on the words of the Acts and on the cases, the residence of a foreign company is preponderantly, if not exclusively, determined by this kind of fact.

Turn now to the Companies (Consolidation) Act. A form of incorporation is indeed prescribed, but how does that affect the matter, any more than the sealing of a royal charter or the royal assent to a private bill? This at most does no more than bring the embryo company to the birth, which in a natural person is not the test. The first effect of the incorporation is to make the new company amenable to English law and English law courts and to give it the status of an English company, but these things only place it in the same position as a British subject born or domiciled here, or as a natural person, who, "resident" or not, is within reach of English legal process. Then the company is to be wound up or to get leave to alter its memorandum or to reduce its capital, in an English Court of law. The domiciled Englishman is similarly under this personal law as to marriage and divorce, intestate administration and bankruptcy. An English company must, under English law, pay its debts and may be fined, but so may any one else who can be duly served with process for acts justiciable in this country. There is no analogy to "residence" here in the sense settled by the decisions for natural persons. These matters depend on the duty of obedience to English law.

What does the Companies (Consolidation) Act say more? A company must have a registered office in the United Kingdom, though it can move it about. Then it must keep certain lists and registers, and allow inquirers to inspect them and, although failure in any of these respects does not ipso facto work its dissolution nor is performance of these essential and important obligations a condition concurrent to its continuing to be incorporated, heavy fines may be inflicted for non-performance and, if not paid, may, I assume, lead to winding up. My Lords, between these requirements and the case of a natural person there is no analogy at all, for the natural person is not subject to them. How then do they constitute a residence such as is shared by a natural person and is analogous to his? It is said that the company is always really present at its registered office and, if you seek it, there you will find it. I can make

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little of this. The Income Tax Acts themselves distinguish between being "in" this country and being "resident" here (No. 2 of the Miscellaneous Rules applicable to Sch. D) and Mr. Cadwalader (1) and Miss Reid (2) are examples of persons, who had a "residence" here, though they were themselves nearly always elsewhere. At night and on Sundays and holidays you will not find the company at its head office, except in a mystical sense, but I would point out that a truer analogy and a more satisfying residence is to be found in "keeping house and doing business" there than in a continuous statutory presence, even during the hours of darkness and of Divine worship. I respectfully find this argument too transcendental for acceptance. Furthermore, all these requirements are enacted for other purposes than those of taxing profits and gains. As far as the Companies (Consolidation) Act goes, no business need be done at this office and no profits or losses made there. Nobody in authority need be present, perhaps nobody at all. The inspection of these registers and so on is the price paid for limitation of liability. It is directed for the assistance of creditors or intending creditors. It is not devised in order to attract tax. That is the business of a special taxing Act.

It is, I think, a legitimate test to see what is the minimum action by the company, which will satisfy the Act, for, if the argument for the Crown is right, even that minimum must inevitably result in "residence" here. The head office need not be in any frequented or convenient place. It may be shared with any number of other persons, natural or incorporated. Whatever has to be done may be left, as it was here, to an independent contractor. No officer of the company nor even any servant need attend. The provisions of the Income Tax Act, which regulate the place at which a taxpayer is to be assessed, ignore altogether the head office of a company which does not carry on its business there: see r. 4, sub-r. 1, of the Miscellaneous Rules applicable to

(1) *Cooper* v. *Cadwalader*, 5 Tax Cas. 101.

(2) *Reid* v. *Inland Revenue Commissioners* (1926) 10 Tax Cas. 673.

Sch. D. Either the place of trade or the place of manufacture or the "ordinary residence" is to be the place. If the respondent company has no place of trade here and does nothing at its head office but the minimum and occasional formalities required by the Act, it is surely an impossible straining of plain words to call that its "ordinary residence." I cannot find anything to forbid the discharge of these obligations by purely mechanical means. A name on a door-post; a letter-box in a door, accessible to the public; a glass-fronted case under a lamp, containing the lists required, so placed that they may always be read from outside, with an occasional visit of a clerk to alter the lists and take away the letters, would seem to satisfy the Act—though of course I express no decided opinion about it. In so far as service may be by post or delivery at the office, the letter-box suffices. If it has to be personal, the Act merely authorizes some one, whom the company arranges to have there—an office-keeper or a typist—to accept service, a thing which the company might have done for itself. Notices and returns could be sent to the registrar from abroad. Though the spirit of the company may be imagined to brood over these arrangements, I do not see how the company itself is there at all. The office is its English address but its business may be elsewhere. If this is "residence," I think it is "residence" not by analogy to that of a natural person but by an independent metaphor. At any rate, if it is to be called "residence," only the Legislature can do it. In doing so a Court of construction would not be interpreting the Act but amending it. Either the Companies (Consolidation) Act should say—"a company registered under this Act is always resident at its registered office for all purposes," though "residence" is a matter quite outside the scope of an Act, which deals only with a company's constitution, obligations and rights, or the Income Tax Act should say "a company registered under the Companies Act shall be deemed to be at all times a person resident in the United Kingdom for income tax purposes," which would raise a crop of difficulties for the Inland Revenue in other directions, to be dealt with when the time comes.

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My Lords, I now turn to the authorities. This point, exactly in its present form, appears not to have been actually decided before this case. In my opinion the *Swedish Central Ry. Co.'s* case (1) does not at all conclude it and on the other hand the whole current of authority since the *Cesena Sulphur Co.'s* case (2) has been such as to make the point one which should be decided against the Revenue and should not be reopened.

All that was decided in the *Swedish Central Ry. Co.'s* case (1) was that the company could have two residences, one in England as well as one in Sweden. Your Lordships were not asked to decide more. It is true that by admission the controlling power over the business was in Sweden, but other business was done in London the character and importance of which, though set out in the case, was not discussed at the Bar. It was a matter of degree on the facts and your Lordships cannot be deemed to have come to some unexpressed conclusion on that ground merely because you did not for yourselves declare either that there was no evidence of business carried on in England or that there was no need to discuss the carrying on of business, because the effect of registration was conclusive. Nor is it decisive of the point to say now that the business done in England was only administrative. It was in fact a good deal more and, in the static condition of the company's affairs, it was not much less important than the Swedish part. If new questions arose the Swedish directors could settle them but, as things were, little had to be done anywhere except "administration," as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend Lord Atkinson and of Atkin L.J. as showing how strong are the grounds for saying that since the *De Beers* case (3) the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act.

(1) [1925] A. C. 495; [1924] 2 K. B. 255.

(2) 1 Ex. D. 428.

(3) [1906] A. C. 455.

In the Court of Appeal the majority held not only that a company could have more residences than one but that the English registration together with the English statutory requirements would suffice to constitute such residence, even though the central control of the business carried on was abroad. This was the argument for the Crown, advanced then, so far as I know, for the first time in any case, by Sir Patrick Hastings. Before your Lordships Sir Douglas Hogg presented the case in a rather different form (1): "Unless it is established that central control is the sole and conclusive test of residence . . . . the finding of the Commissioners disposes of the case. . . . . If necessary, it is submitted a company has a residence where its registered office is, though it may also have a residence where its central control abides." It is I think plain that your Lordships' House affirmed the judgment of the Court of Appeal on the first of these two grounds only, for the Lord Chancellor says (2): "An individual may clearly have more than one residence . . . . and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence." This was said with reference to the fact that there was evidence, on which the Commissioners could act, of business done in England sufficient in importance and in amount to give a residence on that ground. The Lord Chancellor then (3) expressly reserved the point now in debate. No other noble Lord went beyond his above quoted words, and Lord Buckmaster (4), after referring to the *New Zealand Shipping Co.'s* case (5), says: "For purposes of our income tax the real and not a merely nominal residence was here, and if there were also residence elsewhere that did not displace it. The reference to the registered office is important; it is, to my mind, one of the critical facts in determination of residence in this

(1) [1925] A. C. 498, 499.
(2) [1925] A. C. 501.
(3) [1925] A. C. 505.
(4) [1925] A. C. 519.
(5) 8 Tax Cas. 208.

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country, but not necessarily the sole and exclusive fact." This was in accordance with the whole current of authority down to that time, and I would observe that the importance of the fact was for the Commissioners.

My Lords, as I venture to think that the law has been already decided against the respondent's proposition or, if not formally decided, has so long been taken at the Bar and on the bench to be settled, that I must I fear defend this position even at the cost of treading again the weary road of the Tax Cases. This question was a live question over fifty years ago. It was formally contended in *Attorney-General* v. *Alexander* (1) L. R. 10 Ex. (at p. 28) that a corporation's status is and can only be " in the country where it is constituted," a labour-saving proposition that must have commended itself strongly and would hardly have been rejected, if it could reasonably have been entertained. The case was decided on the ground that, apart from questions of residence in the country of incorporation, the claim for tax failed, because the bank did not carry on business here, as the Attorney-General claimed that it did. I will, however, quote his argument; (on p. 26) he says: " Such a body has no locality except by its acts and must be said to reside where its substantial business is carried on," and (on p. 30) Kelly C.B. says: " if . . . . this corporation can be said to be resident anywhere, ... it must be resident in Constantinople, where alone it has its ' seat,' " not, that is, its place of incorporation but its chief place of business, while Amphlett B. (at p. 34) makes his opinion plain that the locality of this seat alone and not the place of incorporation determines the question of residence. In the *Cesena Sulphur* and *Calcutta Jute Companies*' cases (2), the Attorney-General 1 Ex. D (at p. 437) again contended, alternatively to the carrying on of business here, that " its seat and residence can only be in the country where it is created and constituted." For this sundry United States cases were referred to, which were not much in point, but the challenge was boldly taken up by counsel for the Calcutta Jute Co., who says (at p. 442), " the test of residence, at least for fiscal purposes,

(1) L. R. 10 Ex. 20. (2) 1 Ex. D. 428.

is not where is the company incorporated, but where is the real trading carried on."

How then do the learned Barons deal with the point thus clearly raised before them? On p. 445, Kelly C.B. answers the question, "what is the meaning of the word 'residing' as applied to a joint stock company?" thus:—"whether there may or may not be more than one place at which the same joint stock company can reside, I express no opinion at present—a joint stock company resides where its place of incorporation is, where the meetings of the whole company . . . . are held and where its governing body meets in bodily presence . . . . and exercises the powers conferred upon it. . . . ." Huddleston B., at p. 452, says: "I adopt Mr. Matthews' suggestion that 16 & 17 Vict. c. 34, when it speaks of 'residing,' does not mean an artificial residence. It means an actual residence"; and then (on pp. 453–454) he shows how and in what sense actual residence is used, when, negativing the Crown's contention that "if a company was registered in England it must be held to reside in England," he says: "registration, like the birth of an individual, ... must be taken into consideration . . . . but it is only a circumstance" and he goes on to review as other circumstances all the direction and control and administration which take place in England, leading to the conclusion that when those circumstances show the main place of business to be here, then and thereby the company resides here.

Your Lordships will observe that so much of the respondent's present contention as rests on an English company's "residence" in the country of its incorporation was raised in the *Cesena* case (1) by Sir John Holker A.-G. and was negatived by both the learned judges of the Court of Exchequer. So much was an express decision and is now in point. The *Cesena* case (1) has not only never been overruled but it has far too long been cited with respect to be overruled now, nor were your Lordships asked to do so. How are we to decline to follow it? No doubt the Court's decision might have been arrived at without dealing with

(1) 1 Ex. D. 428.

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this point, but are we to say that the explicit rejection of it was therefore a mere obiter dictum, or that the point remains open, because the Attorney-General argued it without mentioning the statutory obligations, which the Companies Acts imposed? All that remains is an argument, which Sir John Holker (not ignorant of the Companies Acts, I am sure) elected to pass by—namely, the statutory obligations of such a company. Surely this does not reopen the decision.

Before passing from the *Cesena* case (1) the case of *Imperial Continental Gas Association* v. *Nicholson* (2), also decided by Kelly C.B. and Huddleston B. shortly afterwards, ought to be mentioned. In it the same difference in language between the two judgments is to be noticed. Both agreed that, as regards the question of Sch. D, the two cases are on all fours. Kelly C.B. (p. 721) says: "this being a foreign undertaking . . . . belonging to a joint stock company, established, incorporated, and resident in England . . . . the whole of the profits . . . . are assessable to income tax in this country" while Huddleston B. says (p. 722): "here . . . . according to the decision of the court, in the *Calcutta Jute Mills* case (1), the business is carried on at the place whence the orders emanate. That is the central point, where the business is carried on . . . . and where the whole transactions occur and . . . . it would be assessed here."

So matters stood for over thirty years. Importance chiefly attached to the place where control of the business was exercised (see *San Paulo (Brazilian) Ry. Co.* v. *Carter* (3)), the place of incorporation being a subordinate matter and the subsequent statutory requirements attracting no attention at all. Then in 1906 the *De Beers* case (4), albeit that of a foreign company, was decided in terms which in my opinion render it conclusive of the present issue.

It was at one time thought that the authority of the *Cesena Co.'s* case (1) had been shaken (see per Charles J. in the *London Bank of Mexico* v. *Apthorpe* (5)), and in 1904,

(1) 1 Ex. D. 428.
(2) (1877) 37 L. T. 717, 721, 722.
(3) [1896] A. C. 31.
(4) [1906] A. C. 455
(5) [1891] 1 Q. B. 383, 388.

in *Goerz & Co.* v. *Bell* (1), "residence" again came up for discussion before Channell J. Though registered abroad, the Goerz Company had its head office in London, where the directing and controlling power was exercised, and the case directly raised the question, whether a company, registered abroad and not in the United Kingdom, can reside here for income tax purposes. *Wingate's* case (2) was one in which a foreign company, though taxed because it carried on the whole of its business here, was yet held to have been "resident" abroad. The Attorney-General contended, and so Channell J. held, that registration was only one point to be considered and that the carrying on of the business of the company was the substantial test. After suggesting that a company may possibly have two residences, he asks whether the registration and incorporation abroad prevented residence in the United Kingdom, and replies that the English Companies Acts provide in the registered office of a company the place where any one who wants to find this company officially must go to find it. He adds that the company in question merely provided by its articles, that all summonses and notices should be served at its head office, in effect saying that "so far as the company has a local habitation it is at the head office," but, as the control and direction were exercised from London, which was the true head office, he finally held that, notwithstanding the South African registration and incorporation, the company was resident in London and was chargeable accordingly. "If it were necessary to decide between Johannesburg and London," he says (3), "I think that the considerations, which go to make up the local habitation of such a body rather show that this company is to be found in London and not in Johannesburg." This sentence supports the finding of the Commissioners in the present case, but how the previous observations can assist the Inland Revenue I am at a loss to imagine, while the statement positively made in [1914] 3 K. B. 132, without discussion, that residence follows from incorporation here,

(1) [1904] 2 K. B. 136. (2) (1897) 24 R. 939.
(3) [1904] 2 K. B. 150.

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must be read in its context—namely, a business carried on here by a person, who is charged as a "resident" here.

It was in this state of the authorities that the *De Beers* case (1) was decided in the House of Lords in 1906. The appellants argued that "a company resides where it is registered and nowhere else," a proposition which, even in a case relating to a foreign company, almost necessarily involved some consideration of the effect of the Companies Acts in this connection, whether it was discussed or not. This perfectly general proposition, which had been advanced by former Crown counsel almost in the same terms in the *Cesena* case (2), was now met by a total denial. Sir Robert Finlay A.-G. was not heard in the House of Lords it is true, but in the Courts below he is reported as saying (3): "the question where a company resides is mainly a question of fact. The place of its incorporation or registration is one circumstance, but only a circumstance, to be taken into account," accepting and citing the *Cesena Sulphur Co.'s* case (2) as authority, equally in the case of a foreign as in that of an English company. In an often-quoted passage Lord Loreburn rejected the appellants' contention. The process of deciding the residence of a company he said was one of seeing, where it really keeps house and does business, not of considering the place or the form of its incorporation or the statutory obligations imposed by the lex loci. He then said that the *Cesena* case and the *Calcutta Jute* case (2), in the former of which he had himself appeared as counsel, had been acted on for thirty years and involved the principle, that a company resides for purposes of income tax where its real business is carried on, and "the real business is carried on where the central management and control actually abides." "I regard that," he said, "as the true rule," and Lords Macnaghten and Robertson concurred without more, while Lord James of Hereford added a remark, which shows how prominently the question of the place of registration was before the mind of the House.

(1) [1906] A. C. 455, 458. (2) 1 Ex. D. 428.
(3) [1905] 2 K. B. 612, 628.

So far, my Lords, it does not seem to have occurred to any judge, that there might be two kinds of residence or two tests of its acquisition, one for the purpose of entangling foreign companies in British taxation and another for that of tying British companies down, so that they cannot wholly escape it. I submit that such a doctrine is illogical in form and in substance unjust. Residence may no doubt be constituted by various kinds of acts, but how it can be constituted in one place by doing something there and, at the same time, in another place by doing nothing I cannot understand.

In considering the true effect of the decision in the *De Beers* case (1) the following matters have to be borne in mind. At that time and for twenty years afterwards it was assumed, that a limited liability company could not have two residences for income tax purposes; either it resided abroad or it did not. The *Cesena Sulphur Co.'s* case (2) was open to review both in the Court of Appeal and in the House of Lords and, although it had stood for thirty years, it had been criticized in the meantime, and what appeared to be its principal ruling was expressly challenged. It was, therefore, natural and proper to consider not only the fact that the De Beers Company was registered abroad but the circumstances of that registration. To this I wish to direct attention. The De Beers Company was incorporated, as the report of the case before Phillimore J. states (3), under s. 3 of the Act 13 of 1888 of the Cape of Good Hope, which enabled a company, registered with limited liability under the Colonial Joint Stock Companies Limited Liability Act, 1861, to become a body corporate on satisfying certain formalities. The material provisions of the Act of 1861 were that it applied to partnerships of more than twenty-five members, and to partnerships whereof the capital was divided into shares transferable without the express consent of all the members. Such partnerships could obtain from the Colonial Registrar of Deeds a certificate of registration with limited liability. They had to lodge with him their deed of settlement, executed by

(1) [1906] A. C. 455. (2) 1 Ex. D. 428.
(3) [1905] 2 K. B. 612.

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not less than twenty-five shareholders holding not less than three-fourths of the nominal capital and endorsed with a certificate that not less than 10 per cent. had been paid up by them, and the registrar was to receive and to keep a copy of such deed with a list of the shareholders and of the number of their shares. Thereafter the joint stock company had to expose its name on the outside of every office where its business was carried on. No increase could be made in its capital until it had been registered with the registrar, with proof of payment of 10 per cent. on the increased capital, and, in case of the execution of new or supplementary deeds of settlement, copies had to be lodged with him. Twice a year the directors had to make a return to the registrar of every transfer made in the company's share register and of the changes in the names of the existing shareholders by marriage or otherwise. The returns, deeds and registers thus kept by the registrar were open to public inspection on payment of a fee, not exceeding one shilling, and copies might be taken and were to be receivable in evidence. The performance of these obligations was enforced by liability to fines, and the certificate of registration conferred on members the benefit of limited liability.

My Lords, I think it is evident that in choosing between registration and carrying on business as the proper test for the single residence of the De Beers Company it was proper to inquire into the circumstances of its registration and not merely to act upon the fact and the place, and, as it was proper and natural to do so, I presume that it was done. The report does not mention any argument of counsel or judicial observation upon the Act above cited, but, even if counsel can be supposed to have overlooked it, one must presume that the Lords Justices and the noble and learned Lords did not neglect to consider all relevant materials. This Act is, I think, sufficiently in pari materia, both in its scheme and in its details, with the Companies Consolidation Act, to have brought before the minds of both tribunals all the considerations, on which the counsel for the Crown have relied in the present case. Accordingly it seems to me that the

decision against the South African registration as the determining factor of the company's residence was really in the circumstances a judicial negation of the Inland Revenue's argument and was more than a mere adoption of the previous decision, that registration alone, apart from consequent statutory obligation, will not establish residence. Having adopted that view, the further adoption of control and carrying on of business as the test alike for the De Beers Company and for the Cesena Sulphur Company followed in logical course. I submit that, even technically, the *De Beers* case is a binding authority to-day. Even if it be otherwise and there be no technical decision of the issue, whether a British company may not acquire a taxable residence here both by carrying on business here and by being incorporated here under the Limited Liability Acts, still, that a House so composed should, after consideration, have adopted a canon, so expressed as to lay down one rule supported by one train of reasoning without meaning that " the rule " applied equally to companies of both kinds exclusively of any other rule or reasoning, is I confess more than I can credit.

I will refer to two later cases in your Lordships' House (fully recognizing that in neither case was the issue of a British company's residence directly raised) for the purpose of citing language so used as to suggest that there is no vital distinction between the tests applicable to a foreign and those applicable to a British company, alleged to reside here. In the *American Thread Co.* v. *Joyce* (1) Lord Halsbury, referring, I think, to the *San Paulo* (*Brazilian*) *Ry. Co.'s* case (2) says : " I myself have taken the same view of this, I think, some years before the De Beers case (3), and that view has been since, I think, adopted in this House more than once, that the real test, which, after all, is only a question of analogy—you cannot talk about a company residing anywhere—and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the company is really directed and carried on in that sense."

(1) 6 Tax Cas. 163, 165. (2) [1896] A. C. 31.
(3) [1906] A. C. 455.

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This expression of opinion can only mean that for both British and foreign companies alike the test is where on the facts (including among all the others the fact of incorporation here or there) the company's business is really directed and carried on.

In *Mitchell* v. *Egyptian Hotels, Ld.* (1), the argument of Sir John Simon A.-G. (pp. 1034, 1035) is: "In *De Beers Consolidated Mines* v. *Howe* (2) Lord Loreburn lays down the principle as the result of the cases as follows, 'The real business is carried on where the central management and control actually abides—' and the Commissioners find substantially in the terms of that judgment. Lord Loreburn also states his opinion, following *Cesena Sulphur Co.* v. *Nicholson* (3), that a company resides for purposes of income tax where its real business is carried on. . . . . That statement involves that a trading company carries on some part at least of its business at the place where it resides, and this company admittedly resides in this country." The admission here mentioned of course was as to the transaction of a part of the business here and did not refer to the English incorporation, on which, as on the Companies (Consolidation) Act, no stress was laid. There is a further case, *John Hood & Co.* v. *Magee* (4), in which a United Kingdom company was again held to be chargeable under Case I. of Sch. D, because in fact an important, and indeed the chief part of its business was carried on at Belfast, and the *De Beers* case (2) was discussed without any suggestion that the test, mentioned in it, was not as universal as its language would imply. Finally I would call attention to *Bradbury* v. *English Sewing Cotton Co.* (5), in which the references made to the rule laid down in the *De Beers* case (2), both in argument for the successful parties (p. 747) and in the opinions delivered (pp. 753, 755 and 765) by the Lord Chancellor, and Lords Shaw and Wrenbury, respectively, are all made in terms, that mention no second sense of residence and suggest no alternative to Lord

(1) [1915] A. C. 1022.
(2) [1906] A. C. 455.
(3) 1 Ex. D. 428.
(4) (1918) 7 Tax Cas. 327.
(5) [1923] A. C. 744.

Loreburn's rule, whether the company in question be foreign, as it was then, or British, as in the present case.

I wish however to refer specially to *New Zealand Shipping Co.* v. *Thew* (1), though again this is the case of a company incorporated abroad. Lord Sterndale and Warrington L.J. in the Court of Appeal and Lord Buckmaster in your Lordships' House (see especially 8 Tax Cas. at p. 229), in whose opinion all the other noble and learned Lords present concurred, all speak of the rule laid down in the *De Beers* case (2) as if no other mode of determining any company's residence was known to them or could be put forward. Lord Sterndale quotes (p. 223) Lord Loreburn's rule and adds: "I think that that is just as accurate a statement of law now as it was at the time it was pronounced." Accurate it may have been but, if the present argument for the respondent is to be sustained, it was sadly lacking in precision, for it bears all the appearance of a universal test. Lord Sterndale proceeds to say that these principles cannot possibly be affected by the statutory obligation of a company registered abroad to file its articles at Somerset House on beginning business here, and Warrington L.J. says of this (p. 228), as I think may truly be said of the statutory requirements imposed on English companies: "It is merely one of the conditions, which must be fulfilled before they can lawfully do so. When that condition is fulfilled, then they can lawfully carry on the business; and if the circumstances are such as to bring them within the principle to which I have referred, they are just as much carrying on the business in this country as if they had not been compelled to file and had not filed their articles." I would also like to quote in this connection his observation in *Lysaght's* case (3) (which it is true is not a case of a company): "I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, and that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act."

(1) 8 Tax Cas. 208. (2) [1906] A. C. 455.
(3) [1928] A. C. 234, 249.

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My Lords, in support of my view that this rule of income tax law has long been deemed to be settled by common consent I would refer to the opinion of the legal profession, as it may be gathered from books of admitted authority. Dowell's work first appeared in 1874 and contained no note on the residence of a British company. His second edition, 1885, after citing the *Cesena* case said (p. 208): "The residence of a joint stock company incorporated and registered in England is in the United Kingdom, and therefore the company is chargeable on profits from business carried on abroad as well as from business carried on in the United Kingdom," and this was repeated in the third edition in 1890 (p. 221). In 1895 the fourth edition (p. 244) modified this as follows: "In order to give effect to the Act as applied to joint stock companies we must suppose that a company has a residence. . . . . In determining the question of residence, registration must be taken into consideration. It is a strong circumstance, but only a circumstance. It is a fact to be considered with all the others. But where a company" (does acts, as in the *Cesena Co.'s* case) "it is a company 'residing in the United Kingdom.'" For this the *Cesena*, the *Calcutta Jute* (1) and the *Imperial Continental Gas Companies'* cases (2) are cited. The sixth edition, 1908, adds that the principle of the decision in the *Cesena* case (1) was approved in the *Goerz Co.* (3) and in the *De Beers Co.* (4) cases, and the seventh edition, 1913, contents itself with a summary of all decided cases to date. Conversely I have endeavoured to find in the great authorities on the Companies Acts, Lindley and Buckley, using the editions for which those celebrated authors were personally responsible, any warrant for the view of those Acts in their relation to income tax, for which the respondent contends. They cite the case that has been so often referred to, but the proposition that an English limited liability company is by law always a resident in the United Kingdom is conspicuously absent. Thus I find in Lindley on Companies, 5th ed., 1889, p. 38,

(1) 1 Ex. D. 428.
(2) (1877) 1 Tax Cas. 138.
(3) [1904] 2 K. B. 136.
(4) [1906] A. C. 455.

the last revision by the learned author himself, the statement that " a registered company does not necessarily dwell where its registered office is situate," citing the *Cesena* (1) and the *Keynsham Blue Lias Lime Co.* v. *Baker* (2) cases ; and my noble and learned friend Lord Wrenbury, in his last revision, 9th ed., 1909, says, p. 154 : " For the purpose of the Income Tax Acts, the place of registration of a company is not, any more than the birthplace of an individual, conclusive as to its ' residence.' A company registered here, with a registered office here, and governed by a board which meets here, is no doubt resident here (*Cesena*). But also a company registered abroad whose head office and directors' meetings are here is resident here (*Goerz*). The test of residence is not registration, but where the company does its real business, where the central management and control abides (*De Beers*)." Similarly Professor Dicey, in the first and second editions of his Conflict of Laws, which were wholly his own, dwells in his r. 19 on the principal place of business as being the domicil of a trading company, and then describes the same test as determining its residence, and, in his Appendix on Income Tax law (2nd ed., p. 770), his note on the *De Beers* case is : " What should be noted is the close connection between residence in the United Kingdom and the carrying on business there. In the case of a trading corporation, or company, the two things can hardly be separated, for the simple reason that such company has not, in fact, any residence, but resides, from a legal point of view, in the country where the central management and control of its affairs is to be found," a proposition only slightly modified on p. 777. No one of these great authorities doubts, any more than Lord Loreburn doubted, that the test is the same for English companies as for foreign ones, or entertains any idea that for income tax purposes performance of the statutory obligations of a registered company has any different significance from that of mere registration. Similarly I have looked into the cases relating to the jurisdiction of county courts over companies. I do

(1) 1 Ex. D. 428. (2) (1863) 2 H. & C. 729.

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not say that they afford much assistance, but they show that the place, where the business is carried on, has long been an integral fact along with that of the registered head office in deciding where a company "dwells" within the County Courts Act (9 & 10 Vict. c. 95, s. 128): *Taylor* v. *Crowland Gas Co.* (1); and in *Keynsham Blue Lias Lime Co.* v. *Baker* (2), where the two were not the same, it was the place of manufacture, where the contract sued on was made, and not the London head office, where the directors met, that satisfied the word "dwells." In neither case were the statutory requirements of the Acts, under which the respective companies were incorporated, treated as having any importance.

I venture to submit that a long current of judicial expressions, whether technically obiter or not, the general agreement of the most valuable text-books and the course taken in argument by so many law officers of the Crown afford sufficient warrant for saying that the rule is settled and ought not to be disturbed. Sir Richard Baggallay and Sir John Holker advanced the present contention, though not on all the present grounds, but it was not accepted. Thenceforward one law officer after another until very recently has treated the rule as having been concluded, under circumstances that implied that the rule was an exhaustive one. Did they all miss the point or did they dismiss it as untenable?

In my opinion these eminent men did not miss the point but, apart from the unsuitability of the word "resident" to the technicalities of the Companies Acts, they saw that the interests of the revenue demanded a different construction. With Victorian rates of income tax it was long before it became worth while for English companies, which exploited foreign trades or properties, to incur the trouble and expense of removing the management from England. They were content to rely on the foreign locality of their enterprise. The crude attempt to rely on the place of incorporation, which was made in reply by the Crown, failed at once and was advisedly

(1) (1855) 11 Ex. 1. (2) 2 H. & C. 729.

dropped, for, had it succeeded, the revenue could not have charged foreign companies trading here. It had not yet been foreseen that the doctrine of double residence could be applied to companies, still less that, if it could, double tests of residence could be tolerated—namely, incorporation for English companies and actual trading for foreign ones, a rightabout face attitude condemned in *Bradbury's* case (1) by Lord Cave L.C. as intolerable.

My Lords, on reference to the Income Tax Act, 1918, I think it must appear that the Legislature itself has by that Act recognized the principle, which I submit was established by the previous current of authority, that for income tax purposes the residence of an English limited liability company depends not on its English registration and statutory obligations but on the facts as to the mode and place in which it controls and directs its affairs. The initial words of No. 7 of the General Rules applicable to All Schedules: "Where a non-resident person, not being a British subject or a British, Indian, Dominion, or Colonial firm or company, or branch thereof, carries on business with a resident person . . . . etc." appear to me in plain English to assume that a "person," being a British company, may be a "non-resident person," and this without any qualification dependent on the manner of its incorporation. If so, the fundamental proposition, on which the argument for the respondent has been rested, is conclusively negatived.

It is, however, contended that the rule, properly construed, refers only to such persons, including companies, as are non-resident, and therefore cannot relate or refer to any companies, which by law must be always resident. There are British companies, which can be non-resident, such for example as have been incorporated by some statute or Royal Charter, not containing provisions equivalent in effect to those pointed out in the Companies (Consolidation) Act, and to these, but to these only, the rule applies.

My Lords, I have not been able to adopt this view. It begs the whole question. It has been admitted that all the

(1) [1923] A. C. 744, 753, 754.

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other "persons" mentioned after the words "not being" are used unrestrictedly and in this respect the drafting was said to have been "loose," but surely, unless express words to the contrary are to be found, words of exception like these are simply used in order to take the things enumerated out of the prior general words, because they would otherwise be included in them. In effect, I think this rule, had it been drafted in paragraphs, one dealing with British subjects, the next with British companies, the next with British firms, and so on, would have meant and rightly should have read "Any non-resident British company, which carries on business with a resident person. . . . ." The matter is not to be brushed aside as the result of unskilful drafting or of hasty discussion in Committee. It was argued, that a rule framed alio intuitu should not be read as unsettling the settled law as to the residence of English limited liability companies, but the truth is that it was framed for the purpose of applying to a new case the income tax law as it then stood and was understood to have been interpreted by the Courts, and to use it now for the purpose of declaring by a tacit assumption a novel interpretation of the Companies Act in the teeth of the decisions of the Court, would be contrary to all the principles on which taxing legislation is framed. It is not thus that draftsmen perform their difficult task. Of course in later stages changes occur which, being the work of many minds and different processes of thought, may mar the symmetrical draft, which was the work of one. For this no apology is ever made, though we are often asked to show it suitable judicial indulgence, but I think this contention fails, as soon as the origin of r. 7 is historically considered.

It was first enacted as s. 31, sub-s. 3, of the Finance Act of 1915, a section which added to the previous rules on the subject of non-residence and extended them, till the Consolidation Act of 1918 converted them into a Code dealing with the whole topic. The section begins: "(1.) Section forty-one of the Income Tax Act, 1842 . . . . shall, so far as it relates to the taxation of non-residents, be extended"

in two particular respects; "(2.) a non-resident person shall be chargeable . . . . in the name of the branch, factor, agent, receiver, or manager" through whom the profits chargeable arose, and then follows (3.), the provision, which is now General Rule No. 7. Sect. 41 of the Act of 1842 provided a method of vicariously charging certain incapacitated natural persons and was not framed for the purpose of charging incorporated persons; nor had it anything to do with the system of incorporating companies with limited liability. Where then there was added to that section a provision relating to a wholly different category of chargeable persons, namely companies, one would expect that the new provision would deal with companies generally, except in so far as express limiting words were employed, but one would not expect that a provision, dealing with the chargeability of non-resident companies, would leave the chargeability of the most important class of such companies to be inferred only from an assumed construction of a non-taxing Act, which had not till that time been laid down by any uniform current of decisions. I am clearly of opinion, that this General Rule adopts and, in effect, declares the view of the law as to the residence of companies generally, which had previously been assumed and acted on in the decisions for a generation or more, and gives statutory recognition to them, and, if so, the respondent's argument cannot be accepted.

The matter is one of very general importance. Many companies have, at the cost of some trouble and expense, transferred their control and management abroad on the faith of decisions, or if you will dicta, to the effect that by so doing they could legitimately reduce the burden of their taxation. Are they now to reconsider their position and, if so, in what direction? The present contention shuts out English companies from the advantages with regard to income from Colonial and other securities, which the Act secures to such natural persons, as change their residence in terms of the Rules, for companies cannot so change it. Such a discrimination must affect the question of the future incorporation of new concerns in England and the further question

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must arise whether British status and British protection are in business worth the price. It is a pity that among the above mentioned advantages were those offered by the Treasury on the issue of certain War Loans to investors generally, for English companies, though they may hold the stocks, cannot have the benefit of exemption from tax, since they cannot be persons "not ordinarily resident in the United Kingdom": s. 46, sub-s. 1. Most of all is it to be regretted, if this grave change is to be brought about, because the Crown adopts a line of argument, which appears to be the contrary of that long put forward on its behalf and thus obtains, as a matter of construction, something, as it seems to me, which the Legislature alone can make law.

In my opinion the appeal should be allowed with costs here and below; the judgments of the Court of Appeal and Rowlatt J. should be set aside and the decision of the Commissioners should be restored, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I have had the privilege and advantage of reading more than once and have carefully studied the judgment which my noble and learned friend upon the Woolsack has just delivered. I think the conclusions at which he has arrived are sound and are borne out by the facts to which he has referred. In my view his judgment is sound in every particular.

My Lords, I have been asked to read the judgment which has been prepared by my noble and learned friend Lord Buckmaster, who is unfortunately unable to be present.

LORD BUCKMASTER (read by LORD ATKINSON). My Lords, by Sch. D of the Income Tax Act, 1918, tax is charged in respect of profits or gains arising or accruing "to any person residing in the United Kingdom" from the property there specified. By r. 1 of the General Rules every body of persons is chargeable like a person, and by s. 237 "Body of Persons" means among other things "any Company."

The appellants are a company incorporated in England under the Companies Acts, and the only question raised on

this appeal is whether, by reason solely of the fact that its registered office must be here, such a company is a person "residing" in the United Kingdom within the meaning of Sch. D.

The difficulty which this question presents is due to the fact that residence is essentially a condition applicable to men, and the tests for its determination, such as living, and sleeping, can have no proper counterpart in an abstract entity such as an incorporated company which can neither live nor sleep. It must, however, be assumed that a company *has* a residence, and if the question is looked at entirely apart from authority, I should have thought that the place of the registered office was also the place where the abstraction known as "a company" resided. It is the place where all notices must be served. It constitutes its address for purposes of legal process, the books which the company are compelled by law to keep must be there kept and held ready for inspection, and it seems to me a fair inference that this is consequently a place where it resides.

The matter cannot, however, be considered in this separate and detached way. In the first place, the decision in the *Cesena Sulphur Co.* and the *Calcutta Jute Mills* (1), if not in express terms, yet by necessary inferential implication decided that a company registered in this country did not have a residence here by reason of that fact alone, subsequent authorities have so accepted this conclusion and companies have arranged their business upon the hypothesis that it was exact. The most definite statement to this effect is to be found in the words of Lord Loreburn (*De Beers Consolidated Mines* v. *Howe* (2)), where he says: "The decision . . . . now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since."

In order to see exactly what was the effect of this decision the cases need further examination. They were decided together. The *Cesena* was a company which was registered both here and in Italy, and in the *Calcutta Jute Mills* case

(1) 1 Ex. D. 428. (2) [1906] A. C. 458.

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the company was registered only here. It is plain that, had the Court regarded the fact that incorporation here, with its necessary consequences of having a registered office and the other associated obligations, was sufficient to establish residence, the cases might have been decided upon that ground, but they clearly were not, and, though there are passages in the judgment of Kelly C.B. (1) which suggest that the registered office might be regarded as a residence, the subsequent statements show that he turned once more to the consideration of where the control of the business was and held that that decided the residence in England. Huddleston B. spoke more definitely on the matter. The argument that registration was conclusive of residence was advanced by the Attorney-General, but this argument the learned judge rejected in these words (2): "Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between a natural and an artificial person, you may say that in the case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others."

The decision, therefore, did clearly declare that the real place of business was a test of residence, and until the decision of this House in the case of *Swedish Central Ry. Co.* v. *Thompson* (3), no one seems to have suggested that residence need not be unique.

It was subsequent to and probably consequent upon that decision that this dispute arose, and pursuant to its authority the Court of Appeal have held that as a residence may be dual the existence of a registered office here is one of its decisive tests.

In forming this opinion, however, a matter which does not appear to have been fully argued has been overlooked. In

(1) 1 Ex. D. 444. (2) 1 Ex. D. 453.
(3) [1925] A. C. 495.

1915 a new rule was added to the General Rules of the Income Tax Acts, incorporated in the Act of 1918 as r. 7, which begins in these terms: "Where a non-resident person, not being a British subject or a British, Indian, Dominion, or Colonial firm or Company carries on business with a resident person. . . . ."

This rule clearly is based on the hypothesis that a British company need not reside here, since it may be "non-resident."

If, therefore, the phrase "British Company" includes a company incorporated under the Companies Acts it is obvious the place where its registered office may be is not the critical consideration for determining residence, since such a company must have its registered office here and could not, therefore, be non-resident.

The only road of escape from this difficulty is the one pointed out by the Attorney-General, which lies in saying the words "British Company" have a limited meaning, and only deal with such companies as need not have a registered office and can, therefore, be non-resident, as, for example, companies incorporated by Royal Charter.

This argument results in cutting down the phrase "British Company" to a relatively insignificant number of companies and depriving it of its most obvious meaning, and that without any reason capable of being extracted from the rule. Had that been the real purpose of the statute it should have been, as it easily could, more simply and directly expressed.

In my opinion, however, such was not its meaning or its purpose. In 1915 the *Cesena* case (1) had been decided for nearly fifty years, the test it laid down had again and again been applied, and the statement of Huddleston B. had not been contradicted in any considered judgment, the statement of Lord Wrenbury in *Egyptian Hotels* v. *Mitchell* (2) being really nothing but an interjection. The result was that in 1915 residence for a company was sought by examining its seat of business, and registration as a sole test was overlooked. It was in these circumstances that the Act of 1915 was passed,

(1) 1 Ex. D. 428. (2) [1914] 3 K. B. 132.

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and its effect was to give legislative sanction to the view that registration alone was not decisive of residence.

It is for this reason that in my opinion the appeal succeeds and should be allowed with costs.

LORD WARRINGTON OF CLYFFE (read by LORD ATKIN). My Lords, the question in this case is whether or not the appellant company was in the years of assessment a person residing in the United Kingdom within the meaning of Sch. D of the Income Tax Act, 1918, construed of course with due regard to other relevant provisions of the Act.

The company was incorporated on April 20, 1904, under the Companies Acts, 1862–1900, as a company limited by shares. By the memorandum of association it was stated in accordance with the statute that the registered office of the company is situate in England.

The actual registered office is at Gresham House, Old Broad Street, in the City of London. This is in fact the office of Mr. F. J. Horne, who carries on there the business of secretary of public companies and performs there on behalf of the company and certain other companies the functions necessary to be performed by them in order to comply with the requirements of the Companies Acts. The names of the companies for whom he acts are on the door of the office.

The business of the company is carried on in Egypt and its affairs are controlled and managed there.

The case thus raises the question whether a company incorporated under the Companies Acts and therefore having a registered office in the United Kingdom, at which under the statutes certain duties have to be and are in fact performed on its behalf, and notices and other documents affecting the company are to be served, is, as a legal consequence of these facts, a person residing in the United Kingdom within the meaning of the Income Tax Act, 1918.

Assessments to income tax for the years 1919–20 to 1924–25 under Sch. D, Cases IV. and V., having been made upon the company by the Commissioners of Inland Revenue,

the company appealed to the General Commissioners for Income Tax for the City of London. The Commissioners found that the company was not resident in this country. At the request of the present respondent they stated a case for the opinion of the Court. The case came before Rowlatt J. in the King's Bench Division on November 23, 1926, who allowed the respondent's appeal from the decision of the Commissioners. His judgment was, on February 18, 1927, affirmed by the Court of Appeal. Hence the present appeal to this House.

The statutory provisions relating to this and all other companies incorporated under the Companies Acts are now contained in the Companies (Consolidation) Act, 1908.

Under that Act every company is to have a registered office to which all communications and notices may be addressed. Every company is to keep a register of its members containing certain particulars enumerated in the statute (s. 25). An annual list of members with a summary specifying a large number of particulars relating to its capital and its liabilities and assets is to be prepared and is to be contained in a separate part of the register of members (s. 26, sub-s. 3). A copy of every instrument creating any mortgage or charge requiring registration under the Act is to be kept at the registered office, and such copies are to be open to inspection by any creditor or member of the company. The register of members, and therefore of course the annual list and summary which are a part of it, are to be kept at the registered office, and under certain conditions are to be open to inspection by members and other persons, and any member or other person may require a copy of the register, or of the list or summary or of any part thereof respectively, on payment of the prescribed sum. Every company is to keep at its registered office a register containing the names, addresses and occupations of its directors or managers. A document may be served on a company by leaving it at or sending it by post to the registered office. This provision extends to service of a writ and of a petition for winding up

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and such service is equivalent to personal service. Service may be thus effected at any time of the day or night.

By No. 1 of the General Rules applicable to All Schedules to the Income Tax Act, 1918, it is provided that every body of persons is to be chargeable to tax in like manner as any person is chargeable under the provisions of the Act.

Inasmuch therefore as tax is imposed upon a person residing in the United Kingdom it is clear that the artificial person a company under the Companies Act, amongst other bodies of persons, is regarded as capable of residing in the United Kingdom, although of course, inasmuch as it neither eats nor sleeps nor performs any of the physical or social functions of a natural person, the fact of residence depends upon other considerations than those which determine the residence of an individual.

Independently of authority, and in the absence of any relevant provisions of the Income Tax Act, 1918, throwing light on the meaning attributed by the Legislature to the words "residing" and "resident," as used in the Act, I should probably have been of opinion that the provisions of the Companies Act to which I have referred lead to the conclusion that, whatever other residence the company may have, the Legislature has provided that the registered office shall be a residence.

Certain corporate functions imposed upon it by the Act are to be performed at that place. Service of the most important documents, which in the case of individual persons must be served personally, may be effected by this being left at or sent by post to the registered office without restriction as to time.

The cumulative effect of these provisions apparently creates for the company a statutory home where it is to perform the corporate functions above mentioned, and where it is regarded as at all times present and ready to receive such documents and communications as are left or sent there.

This state of things would go some way to establish that in the case of a registered company there are present those

conditions which, in the case of an artificial person may constitute a residence in that part of the United Kingdom in which by the terms of its memorandum of association the registered office is situate.

But I have to consider the authorities and such relevant provisions as may be found in the Act of 1918 and to determine whether the opinion I have above expressed can be maintained in view particularly of the provisions of the Act.

At the date of the passing of the Act of 1918 the authorities were in this position :—

In *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Co.* v. *Nicholson* (1) Huddleston B. expressed himself as follows: "In the present argument the Attorney-General advanced a proposition to which I cannot assent. He suggested that the registration of a company was conclusive of its residence, that if a company was registered in England it must be held to reside in England. I think the answer which was given during the argument is a good one. It is this :— Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between a natural and an artificial person, you may say that in the case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others. If you find that a company which is registered in a particular country, acts in that country, has its office and receives dividends in that country, you may say that those facts, coupled with the registration, lead you to the conclusion that its residence is in that country." The case, however, was decided on the ground that in both cases the company in question carried on substantial business in this country.

In *De Beers Consolidated Mines* v. *Howe* (2) it was decided in this House that in the case of a company registered abroad the test of residence is where it really keeps house and does its

(1) 1 Ex. D. 428, 453. (2) [1906] A. C. 455.

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real business, and the real business is carried on where the central management and control actually abides.

In 1918 it was I think assumed that the general current of authority, and in particular the *Cesena* case, the *De Beers* case and certain other cases as to foreign companies had settled the question as to British companies—namely, that the mere fact of incorporation in this country, though an important circumstance, would not involve residence here, though the provisions of the Companies Act as to the registered office referred to above were not considered in those cases. In this assumed state of the law the Act of 1918 was passed, and there is in that Act one provision which to my mind shows conclusively that the Legislature accepted and acted on that view of the law. It is found in No. 7 of the Rules applicable to All Schedules. The material part of the rule is as follows: "Where a non-resident person, not being a British subject or a British, Indian, Dominion, or Colonial firm or company, or branch thereof, carries on business with a resident person," and certain facts and circumstances appear to the Commissioners, then "the non-resident person shall be assessable and chargeable to tax in the name of the resident person as if the resident person were an agent of the non-resident person."

This rule appears to me clearly to assume that a British company equally with an individual British subject might for the purposes of the Act be a non-resident person. I can see no legitimate reason for excluding from the expression "British Company" a company registered under the Companies Act; in fact the rule as a whole indicates to my mind that such companies were those principally referred to. The result is that, as every British company is under a statutory obligation to have a registered office to which there are attached by statute the incidents and characteristics above referred to, every such company, notwithstanding the provisions as to the registered office, may for the purposes of the Act be a non-resident company.

If this be the true construction of the Act it cannot be maintained that as a matter of law the Commissioners were

bound to decide that the applicant company was resident in this country. The question before them was thus one of fact; there was ample evidence on which they could find as they did, and it was not competent to Rowlatt J. and the Court of Appeal to reverse their decision. The appeal ought to be allowed with costs here and below.

It is right to add that, though the point was raised in the Court of Appeal, it appears not to have been pressed, and there is no reference to it in any of the judgments. It was not mentioned by counsel at your Lordships' Bar but was raised by one of your Lordships after the original argument, and the case was restored that it might be dealt with.

The case of *Swedish Central Ry. Co.* v. *Thompson* (1) was decided subsequently to the Act of 1918. The point on which, as I think, this case turns was not raised. There are however dicta in my judgment in that case in the Court of Appeal (2) which cannot be supported having regard to the present decision.

Order of the Court of Appeal reversed and decision of the Commissioners for the General Purposes of the Income Tax for the City of London restored. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 23, 1928.

Solicitors for the appellants: *Herbert Smith & Co.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

(1) [1925] A. C. 495. (2) [1924] 2 K. B. 255.

[HOUSE OF LORDS.]

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BEVAN . . . . . APPELLANT;

AND

NIXON'S NAVIGATION COMPANY, LIMITED . . . . . RESPONDENTS.

Workmen's Compensation—Partial Incapacity—Miner—Disablement from Miners' Nystagmus—Inability to work Underground—Inability to obtain Surface Work owing to Labour Conditions—Amount of Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *First Schedule, para.* 3.

A workman employed as a collier at the coal face contracted miners' nystagmus, which disabled him from working underground, but left him fit for work on the surface, and he worked at a reduced wage as a surface labourer until the closing down of the pit. The pit had since been reopened, but the workman had been unable to obtain any suitable employment. Upon an application by the workman for an increase of compensation, the county court judge found (1.) that but for the nystagmus the workman would have been employed as a collier at underground work at wages at least equal to his pre-accident wages, and (2.) that his inability to get surface work was solely due to labour conditions; and, on the authority of *Cardiff Corporation* v. *Hall* [1911] 1 K. B. 1009, he held that the workman must be taken to be able to earn wages at the then current rate for surface work, and fixed the amount of compensation on that footing:—

Held (by Viscount Dunedin, Lord Phillimore, and Lord Carson; Lord Shaw of Dunfermline and Lord Blanesburgh dissenting), that "able to earn" in para. 3 of the First Schedule to the Workmen's Compensation Act, 1906, had reference to the workman's physical condition alone and did not include the proviso of employment if the workman fairly attempted to get it, and that the award was right.

Cardiff Corporation v. *Hall* [1911] 1 K. B. 1009 followed.

Ball v. *William Hunt & Sons* [1912] A. C. 496 and *Portland Colliery Co.* v. *Murray* [1923] A. C. 566 distinguished.

APPEAL from an order of the Court of Appeal (Lord Hanworth, Atkin and Sargant L.JJ.) affirming an award of the county court judge of Glamorganshire in an arbitration under the Workmen's Compensation Acts.

The following statement is taken from the opinion of Viscount Dunedin.

* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

" The circumstances out of which this appeal arises are as follows :—

The appellant was a collier and worked at the face. He had been employed by the respondents for forty years up to 1919. At that time his wages were 2*l.* 13*s.* 3*d.* per week. In April, 1919, he was certified as suffering from the industrial disease of nystagmus. This prevented him from working at the face. Up to May, 1920, he was paid full compensation as for total disablement at the rate of 1*l.* By this time he was fitted for surface work though not for work at the face, and he was employed on surface work up to 1922 when the pit ceased working. It was reopened in December, 1926, and is still working. From June, 1922, till May, 1927, he was paid on the basis of partial incapacity. The sum actually paid from December 2, 1926, to May 17, 1927, was at the rate of 15*s.* 1*d.* per week. Since June, 1922, he was unable to find any surface work. On April 29, 1927, he filed a request for arbitration alleging that the compensation to be paid to him should be raised from 15*s.* 1*d.* to 1*l.* per week as from December 2, 1926. The respondents countered this by a demand that the compensation should be reduced to 5*s.* 3*d.* as from May 17, 1927. This was based on an assertion that he was able to earn, in spite of the nystagmus, wages of 2*l.* 2*s.* 8*d.* per week, and that his inability to find work had no connection with the nystagmus.

The case came before the arbitrator. He found certain facts of which the material stated in proposition are these :—

(1.) That but for the nystagmus the appellant would be getting work at the face and would be earning 2*l.* 13*s.* 3*d.* per week.

(2.) That his physical condition with the nystagmus fitted him for surface work for which at current rates he would be paid 2*l.* 2*s.* 8*d.* per week.

(3.) That he could not get surface work solely on account of labour conditions.

He then stated that the two alternatives were either that he should award 1*l.* per week, being the maximum calculated as for total incapacity, or 5*s.* 3*d.* per week, being half the

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difference between the pre-accident figure of 2*l.* 13*s.* 3*d.* and a wage of 2*l.* 2*s.* 8*d.* which the workman must be taken as able to earn. The learned arbitrator, after a long review of the cases, in which he showed clearly that he was personally in favour of the first alternative, came to the conclusion that he was bound by the case of the *Cardiff Corporation* v. *Hall.* (1) The Court of Appeal also held themselves so bound."

1928. May 14, 15, 17. *Upjohn K.C.* (with him *A. T. James K.C.* and *W. Shakespeare*) for the appellant. But for his disablement the appellant would have continued to be employed as a collier and would have earned wages at least equal to his pre-accident wages. By reason of his disablement he has been pushed out of a class in which he could have got employment into a class in which he cannot get employment. The depression of this man as the result of the accident into the class of unskilled labour ought not to deprive him of compensation where no suitable work is open to him in the unskilled labour market. This is, in effect, an appeal from the decision of the majority of the Court of Appeal in *Cardiff Corporation* v. *Hall.* (1) The observations of all the learned Lords who took part in the decision in *Ball* v. *William Hunt & Sons* (2) are really inconsistent with the *Cardiff* case. Those observations show that inability to earn is not limited to physical incapacity, but that the conditions of the market are to be taken into account. So, too, in *Portland Colliery Co.* v. *Murray* (3) regard was had to the fluctuations of the labour market. See also *Woodilee Coal and Coke Co.* v. *M'Neill* (4); *Heathcote* v. *Haunchwood Collieries* (5); *Proctor & Sons* v. *Robinson.* (6) In *Lewis* v. *Guest, Keen & Nettlefold* (7) the Court merely said that it was bound by the *Cardiff* case. (1)

Edward Cave K.C. (with him *Edgar Dale*) for the respondents. A workman is entitled to compensation only for incapacity for work resulting from injury and not for unemployment resulting from the conditions of the labour market. The

(1) [1911] 1 K. B. 1009.
(2) [1912] A. C. 496.
(3) [1923] A. C. 566.
(4) [1918] A. C. 43.
(5) [1918] A. C. 52.
(6) [1911] 1 K. B. 1004.
(7) [1928] 1 K. B. 20.

Cardiff case (1) has never hitherto received any condemnation by the House of Lords, and it was rightly decided. Moreover the Legislature in s. 16 of the Workmen's Compensation Act, 1923, recognizes that the law was correctly laid down in the *Cardiff* case, and then proceeds to modify that law to a limited extent in favour of the workman. Sect. 16 appears to be a statutory gloss on the *Cardiff* case. It gives the workman something more than the *Cardiff* case, but much less than that which is claimed by the appellant in this case. If the *Cardiff* case was wrongly decided s. 16 was pleonastic.

Upjohn K.C. This point was not raised in the Courts below and was not mentioned in the respondents' case.

Cave K.C. This is merely a ground for suggesting that the county court judge was right in following the *Cardiff* case, and it was not necessary to include it in the respondents' case. There was no opportunity to raise the point in the Court of Appeal, because the respondents were not called upon.

The respondents rely upon the *Cardiff* case independently of s. 16. The nystagmus was no handicap to the appellant getting light work, and the sole reason why he could not get light work was the condition of the labour market. Before an employer can be called upon to pay compensation that from which the workman is suffering must be something which results from the injury, and here the finding of the county court judge negatives that. In *Ball* v. *Hunt & Sons* (2) the inability of the appellant to earn wages was due to a physical defect. So, too, in *Macdonald* v. *Wilsons and Clyde Coal Co.* (3) it was the appellant's physical condition which rendered his work unsaleable. If a workman cannot find work owing to labour conditions he is not entitled to compensation.

[As to the meaning of "able to earn" in para. 3 of the First Schedule to the Act of 1906 he referred to *Dobby* v. *Wilson, Pease & Co.* (4); *Harwood* v. *Wyken Colliery Co.* (5); *Thompson* v. *Richard Johnson & Nephew* (6); *Lewis* v.

(1) [1911] 1 K. B. 1009.
(2) [1912] A. C. 496.
(3) [1912] A. C. 513.
(4) (1909) 2 B. W. C. C. 370.
(5) [1913] 2 K. B. 158.
(6) [1914] 3 K. B. 694.

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Wrexham and Acton Collieries (1); *Williams* v. *Oakwood Colliery Co.* (2); *Kear* v. *Shelton Iron, Steel and Coal Co.* (3); *Gaffney* v. *Chorley Colliery Co.* (4); *Middleton* v. *Wharncliffe Woodmoor Colliery Co.* (5); *Bromley* v. *Staveley Coal and Iron Co.* (6); *Palmer* v. *Crawshay Brothers* (*Cyfarthfa*) (7); *Hamilton* v. *Shelton Iron, Steel and Coal Co.* (8); *Williams* v. *Cwmaman Coal Co.* (9); and as to the effect of the Act of 1923, to *Clarke* v. *United Steel Companies* (10); *Meade* v. *United National Collieries* (11); *King* v. *British Steel Corporation.* (12)]

Upjohn K.C. in reply. Sect. 16 of the Act of 1923 throws no light on para. 3 of the First Schedule; it does not amount to a legislative interpretation of that provision. The section was designed for the benefit of the workman, and it takes a workman in certain circumstances out of partial incapacity into total incapacity, to which para. 3 has no application.

The House took time for consideration.

1928. July 25. VISCOUNT DUNEDIN [after a narrative of the facts:] My Lords, *Cardiff Corporation* v. *Hall* (13) was decided on the Act of 1906. It dealt with the right interpretation of paras. (1.) (*b*) and (3.) of the First Schedule. For clearness' sake, it may be well to set them out.

"(1.) The amount of compensation under this Act shall be— . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

"(3.) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the

(1) (1916) 9 B. W. C. C. 518.
(2) (1919) 12 B. W. C. C. 151.
(3) (1921) 14 B. W. C. C. 121.
(4) (1922) 15 B. W. C. C. 158.
(5) (1922) 15 B. W. C. C. 166.
(6) (1923) 16 B. W. C. C. 77.
(7) (1926) 19 B. W. C. C. 164.
(8) (1926) 19 B. W. C. C. 475.
(9) (1927) 20 B. W. C. C. 476.
(10) (1925) 18 B. W. C. C. 525.
(11) (1926) 19 B. W. C. C. 339.
(12) (1928) 21 B. W. C. C. 37.
(13) [1911] 1 K. B. 1009.

workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

The whole controversy turned on the words "is earning or is able to earn." Does "is able to earn" mean is in such a physical condition that he is able to earn and that alone, or does it also include the proviso of employment if the workman fairly attempts to get it. Cozens-Hardy M.R. took the latter view. Fletcher Moulton and Buckley L.JJ. the former. Their opposing views are clearly set forth. Cozens-Hardy M.R. says (1): "This state of facts raises the question whether an employer, admittedly liable to pay compensation for an accident which disables the man from following his former occupation, can obtain an order for the termination or reduction of the compensation by merely proving physical ability to do light work without either offering to provide such work, or adducing some evidence that light work can be obtained in the neighbourhood where the man resides, and of a suitable character. In my opinion, apart from authority, this question should be answered in the negative. The effects of the accident have not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground that he is physically able to do a different kind of work, which, in truth, cannot be procured. It is not a case in which the effects of the original injury have completely disappeared so that the man is as capable as ever he was. In that case the employer, who does not guarantee the labour market, is free from all further liability."

Fletcher Moulton L.J. says (2): "It is impossible to hold that the employer necessarily or generally guarantees the conditions of the labour market where there is partial incapacity any

(1) [1911] 1 K. B. 1013. (2) [1911] 1 K. B. 1020.

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more than he guarantees that the workman shall get employment where incapacity has for the time ceased. An example will make this clear. Suppose that in the business of a mechanical fitter there is a class of work requiring a special fineness of touch or keenness of sight so that it can only be done by persons specially gifted in these respects and that it accordingly commands higher wages. Suppose also that an accident happens to one of these first-class fitters which injures his sight or touch to such an extent that he now has that sense only in an average degree of perfection, and thus is qualified only for the work of an ordinary fitter, but which does him no other injury. His position after the accident is that he has lost thereby the difference of earning power of a first-class fitter as compared with an ordinary fitter. But he has lost no more. I can see no reason why his chance of obtaining employment or his power of earning wages should be treated for any purpose as different from that of a man who has all his life been an average fitter, and, inasmuch as the employer does not guarantee the state of the labour market for one who is and has previously been an average fitter, I cannot see why he should guarantee the state of the labour market for the workman who has now become one."

Buckley L.J. says (1): "It has been laid down that upon an original arbitration the state of the labour market is altogether outside the question of compensation: that the question is, not whether the man can in the then state of the labour market get a place, but whether as a result of the accident he is under an incapacity for work which prevents him from being as eligible as he was before the accident for a place. The same in my opinion is true upon an application to review. Having regard to any incapacity for work personal to the workman arising from the injury, what is the difference between the amount of his average weekly earnings before and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident? This is the question to be answered. The two following propositions are of course distinct: First, that

(1) [1911] 1 K. B. 1026.

owing to incapacity for work arising from the accident the condition of the workman is such that his labour is not saleable or is saleable only at a reduced figure, and, secondly, that his labour is saleable or is saleable at the same figure as before the accident but that he has failed to find a purchaser. The former and not the latter is the relevant proposition in the question of compensation. To express the same thing more briefly, inability to earn for the purposes of Sch. I., para. 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market. The employer may be called an insurer of ' capacity for work,' but he is not an insurer of a ' right to work.' The Workmen's Compensation Act is not a Right to Work Act."

Now the case of *Cardiff* (1) has ruled the practice ever since its date, but it is not binding on your Lordships. This appeal is truly an appeal against the *Cardiff* case. It was argued by the appellant's counsel that the *Cardiff* decision had been displaced by what was said in this House in the three cases reported under the name of the *Portland Colliery Co.* v. *Murray*. (2) My Lords, I think this is a mistake. The point in all the three cases was the same and was this. A partially incapacitated workman was paid compensation as such, he being employed in work that suited his incapacity ; then in the war-time the wages for that work rose beyond the figure which he had earned in pre-accident days and the compensation then ceased. Wages then fell, and the question then was whether the physical condition of the workman being unchanged it was competent for the Court to revert to a payment of compensation. The present question was never raised. In my opinion the decision is summed up thus at p. 577 : " The right to receive compensation for partial incapacity then revives and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn."

A single sentence of the headnote is misleading ; doubtless founded on the fact that in one of the cases the second Division

(1) [1911] 1 K. B. 1009. (2) [1923] A. C. 566, 577.

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of the Court of Session had remitted to the arbitrator to determine compensation where the fact was established that the man could not find work, and that in my opinion I had said they had " rightly done so." But the present point was not before the House, and was never argued.

My Lords, had I sat on an appeal against the *Cardiff* case (1) in 1912 or 1913, I find it hard to say what my opinion would have been. I have always felt the strength of the argument that the words are not " able to work " but " able to earn," and that it is hard to say that a man is able to earn when there is no employment at which he can earn. But the present case is not in 1912, it is now. The application for arbitration bore to be made under the Act of 1925; but that is an error, for although the date of 1925 is passed yet s. 50 of that Act says that it shall not apply in any case where the accident happened before the first day of January, 1924. But then there is the Act of 1923, and s. 31, sub-s. 2, of that Act says that it is to be construed as one with the principal Act, to wit, the Act of 1906. Now the Act of 1923 was passed in the knowledge that the interpretation of the original section was as stated, and s. 16 of the Act of 1923 is as follows :—

" If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of the principal Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by paragraph (16.) of the First Schedule to the principal Act :

Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit."

It may not be amiss to state, though it has not any real bearing on the argument, that this section is repeated totidem

(1) [1911] 1 K. B. 1009.

verbis in s. 9, sub-s. 4, of the Act of 1925, so that the decision in this case will rule cases arising under that Act.

My Lords, I am unable to resist the light on the whole position thrown by this section. It seems to me necessarily to exclude the idea that "able to earn" applies to any circumstances not personal to the man himself. It deals expressly with the case of the man who cannot find work and it sets the criterion whether the failure to find the work is due wholly or mainly to the accident. Here we are faced with the finding in fact that the failure to find work was due solely to the state of the labour market, but that state of affairs is expressly excluded by the section.

The appellant laid great stress on the fact that the accident had the effect of driving the appellant from one class of work to another. The case is actually dealt with by Lord Moulton in the opinion quoted. But as regards s. 16, be it observed that that deals with fitness for employment of a certain kind, i.e., not his original employment. It is as regards that which I may call substituted employment that the criterion is put. I am, therefore, somewhat unwillingly driven to the conclusion that in face of s. 16 it is impossible to say that the *Cardiff* case (1), when applied to a case after the passing of the 1923 Act, is wrong.

I move that the appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I have considered and reconsidered this case. If the judgment of the Court of Appeal stands then I do not entertain any doubt that it pro tanto defeats the main object of the Workmen's Compensation Acts, and it unduly and improperly reduces the scale of compensation awarded therein.

The case was tried before a most experienced county court judge, whose statement discloses his conviction to the same effect, and further indicates that but for the *Cardiff* case (1) he would have had no hesitation in awarding to the injured miner on the scale or footing of 1*l.* instead of 5*s.* 3*d.* per week. That is to say, he could not have seen his way

(1) [1911] 1 K. B. 1009.

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to hold that the injured collier, who was no longer fit by reason of the accident for work at the face, could be treated as able to earn the wages of a surface worker when in point of fact no such work was procurable by him. He was forced, however, by the state of the law, and particularly by the decision of the *Cardiff* case (1), to give the smaller award.

When the case reached the Court of Appeal, the learned judges similarly referred to the *Cardiff* case (1), Lawrence L.J. doing so simpliciter, and Atkin L.J. refraining from expressing his individual opinion on the principle involved. The Master of the Rolls alone committed himself to the enunciation of similar doctrines to those pronounced in the case mentioned. I am of opinion that *Cardiff* (1) was wrongly decided.

I hold further that this House is substantially committed by declaration here made to a similar opinion.

In the *Cardiff* case (1) the Master of the Rolls, Cozens-Hardy, dissented, and he founded his dissent upon powerful authority. The question, although difficult to answer, can be simply stated. Under the statute the measure of compensation to be awarded to an injured workman in respect of his injury is the difference between what he earned prior to the accident and "the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident."

In *Clark* v. *Gas Light and Coke Co.* (2) a gasworks coal porter was injured, but the workman had physical capacity enough to be a gate-keeper or watchman, the duties of that employment not requiring the full use of an injured hand. It was also found that the man had made all reasonable efforts to get this light work and had been unable to get it and the arbitrator accordingly refused to reduce the compensation. An appeal against this refund was dismissed: and Collins M.R. dealt with the proposition as to what was meant by "being able to earn." "It was argued," said he, "that the question whether his opportunity of finding work from which he might earn the same wages had been narrowed in consequence of the accident ought not to be taken into

(1) [1911] 1 K. B. 1009. (2) (1905) 21 Times L. R. 184, 185.

consideration, the one and only question being as to his physical capacity for work. Here the applicant had made bona fide efforts to find such work as he was capable of doing and had failed. It was said that he must put up with such incapacity to get work without having recourse to his employers, and that all consideration of the existing conditions of the market must be shut out." That appeared to him to be contrary to common sense and not to be involved in the authorities, still less in the Act itself.

Founding upon this case and *Proctor & Sons* v. *Robinson* (1), the Master of the Rolls, in a passage bearing precisely upon the facts of the present case, puts the question (2) as to: "Whether an employer, admittedly liable to pay compensation for an accident which disables the man from following his former occupation, can obtain an order for the termination or reduction of the compensation by merely proving physical ability to do light work, without either offering to provide such work, or adducing some evidence that light work can be obtained in the neighbourhood where the man resides, and of a suitable character." "In my opinion, apart from authority," says Cozens-Hardy M.R., "this question should be answered in the negative. The effects of the accident have not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground that he is physically able to do a different kind of work, which, in truth, cannot be procured."

In my view those opinions of Lord Collins and Lord Cozens-Hardy correctly state the legal principle to be applied.

The majority of the Court of Appeal, however, consisting of Fletcher Moulton and Buckley L.JJ., were of a different opinion. Says the former (3): "His" (the workman's) "position after the accident is that he has lost thereby the difference of earning power of a first-class fitter as compared with an ordinary fitter. But he has lost no more."

My Lords, I dissent from this view. The measure of damages given in the statute is not the difference of earning

(1) [1911] 1 K. B. 1004. (2) [1911] 1 K. B. 1013.
(3) [1911] 1 K. B. 1020.

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power but the difference in fact between what was earned in wages before the accident and what he is earning or is able to earn in wages. It is wages he has lost by reason of the accident. He has been displaced also by reason of the accident from a position in which de facto he did, and also de facto he could now, earn wages to a position in which he does not earn such wages and is not able to earn such wages. The learned Lord Justice proceeds to say: "I cannot see why he" (the employer) "should guarantee the state of the labour market" for the workman so displaced. There is no question of guarantee. The question is one of fact. The workman there, as in the present case, was displaced by reason of the accident from the region of employment into a region of unemployment. No guarantee is asked for the state of the labour market, but compensation is asked for the situation of the workman having been changed from a position in which wages were actually earned to a position in which, whether by the state of the labour market or for any other reason, wages cannot be obtained.

Buckley L.J. (1) puts the question whether as a result of the accident he is under an incapacity for work which prevents him from being as eligible as he was before the accident for a place. This, in my opinion, does not correctly state the two factors of the comparison set down by the Act. These are, firstly, wages received prior to the accident and, secondly, wages not received after the accident. It is not a question of comparative eligibility, it is a question of difference in receipts—a money question. The learned Lord Justice adds that the relevant proposition in compensation is that: "The condition of the workman is such that his labour is not saleable or is saleable only at a reduced figure."

I do not think that this is at all a correct statement of the issue in a compensation case. It is not saleability of labour that is the factor of comparison set up by the Act; that factor is the receipt of wages before and the receipt of wages after the accident. If the workman was put into the position by reason of the accident that his wages received were to be

(1) [1911] 1 K. B. 1026, 1027.

compared with what he was earning or able to earn in wages after the accident, it seems to me no solution of the problem to introduce the idea of the saleability of labour. Nor, indeed, even if the phrase were employed could the saleability of labour be introduced as a factor of comparison so as to cover the case of labour offered but not accepted by purchase. Until you have the latter operation there is no earning whatsoever. The learned Lord Justice's propositions are summed up when he says : " The employer may be called an insurer of ' capacity for work,' but he is not an insurer of a ' right to work.' "

Again, I think this analogy, this test of insurance, fails. It is true that " The Workmen's Compensation Act is not a Right to Work Act." No. It does not deal with a right to work ; it does not make that any standard of comparison as before and after an accident ; but it does deal, not with the right to work, but with the power to earn wages, and it is that money comparison which makes the standard of compensation in money which the Act, I feel certain, meant to set up. For this reason I myself feel unable to accept the *Cardiff* case (1) as setting forth a sound interpretation of the Act.

But, my Lords, I regret to observe that sufficient attention has not been paid to the decision of this House upon the question now again before it. The question at issue in this case is succinctly and accurately made to turn upon the words " is earning " or " is able to earn," and does the phrase " able to earn " mean, and alone mean, physically able to work, although in fact unable to earn anything ?

I refer in particular to the case of *Ball* v. *Hunt & Sons.* (2) The workman in that case lost the sight of an eye. He was unable to obtain work being a one-eyed man, although his ability to work remained exactly as it was before. But the importance of the case is that it dealt with the general question of the introduction of the subject of labour conditions into such an issue. Lord Macnaghten put the matter thus : " As Lord Halsbury observed " (in the case of *Lysons* (3)),

(1) [1911] 1 K. B. 1009. (2) [1912] A. C. 496, 501, 505.
(3) [1901] A. C. 79.

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"'the first thing one has to do is to apply one's mind to what is the substantive intention and meaning of the statute.' It seems to me that the injury for which this statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages in the employment in which the injured workman was engaged at the time of the accident." Lord Atkinson touches the exact point of this present case when he says: "There would be no meaning, it would appear to me, in these provisions making the amount of wages which were, are, or can be earned so much the basis of compensation, if the market for the workman's labour has to be left out of consideration. The earning of wages depends as much on the demand for the workman's labour as it does upon his physical ability to work."

It should be borne in mind that the case of *Ball* was the case in which the physical appearance of the man was so altered as to reduce his chance of employment, but it is to be borne in mind that the general question was also fully treated, as those sentences show. In my own opinion I quote the case of *Clark* v. *Gas Light and Coke Co.* (1) with approval. But in *Ball's* case, from which these citations are made, reference was made to the Scotch case of *Boag* v. *Lochwood Collieries* (2), in which the Lord Justice-Clerk put the question thus: "Is it any reason for reviewing the payment to say that the employers cannot find him suitable work for his capacity, or that he has not been able to find such work himself? If the appellant means that his averments if proved would of themselves be a sufficient ground for saying that compensation must be increased to the full allowance under this statute, I should certainly not for myself yield for one moment to any such demand. I take it that the whole question is that of 'capacity to work,' which cannot be decided merely by the fact that the workman has not got work, but only by such evidence as satisfies the Court whether or not he is able to work."

(1) 21 Times L. R. 184. (2) 1910 S. C. 51, 52.

My Lords, I pause there to observe that that is precisely the *Cardiff Corporation* doctrine. It is boldly and baldly stated. This is how I am reported as having dealt with it. (1) "This is a broad affirmance of the proposition that incapacity under the Act must be limited to physical incapacity and to that alone. So stated, I think the proposition—with which I have already dealt at length in the earlier part of my opinion—to be an unsound proposition and the decision of *Boag* (2) to be erroneous."

A decision to the same effect was pronounced by this House in *Macdonald* v. *Wilsons and Clyde Coal Co.* (3)

My Lords, I now ask myself how the principles thus set forth by this House apply to the facts of the present case. It has been found by the learned arbitrator that but for the nystagmus the appellant would be getting work at the face and would be earning 2*l.* 13*s.* 3*d.* per week. The first factor of comparison is thus clear. From that field of work in which to-day, but for the accident, he would have been employed at the wage stated, he has been displaced by the accident. He has been unclassed from the field of work known as work at the face. He has been declassed into the field of work known as surface work. In that field of work it is not questioned that he cannot obtain employment. That is one of the outstanding features of the position. He has been unclassed from an employed field and declassed into an unemployed field. His employment at wages has been succeeded by unemployment and no wages. The cause for his change from the one position to the other is the accident. The compensation for that accident is to be measured by the difference between the one condition and the other.

The answer is: "Oh! He may not be earning now, but he is physically able to earn now." The question is what is he able to earn? He may be able to work but is he able to earn? Does not earning mean something more than work? Earning means working for wages and getting wages; and when the statute says "or is able to earn" that means "or is able to

(1) [1912] A. C. 512. (2) 1910 S. C. 51, 52.
(3) [1912] A. C. 513.

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work for and to get wages." This unfortunate workman by reason of the accident is not able to work for and get wages. Earning means earning wages; not earning approval or gratitude but earning money. It is replied that he is physically able, to which the answer is, of what avail is physical power if a man is driven into a sphere where it cannot be exerted so as to produce wages? He has been physically disabled, and he is a disabled man for face working who is now confronted with the task of trying to earn work in another department where there is none available. This position has been directly brought about by the accident and consequent disease.

It appears to me that the compensatory provision provided by the Acts of Parliament is by the *Cardiff* and by the present case improperly impaired. The learned arbitrator points out the hardships that will result if this be reckoned to be the state of the law, and also the smoothness with which the other view can in accordance with fair dealing operate.

Finally, my Lords, I think it a mistake to conclude that the undoubted hardship under the *Cardiff* case was ever accepted by Parliament or that (1.) Parliament meant to confirm and accentuate that hardship and (2.) to set at nought the pronouncements made in this House and above quoted by the provisions of s. 16 of the Act of 1923. It is as follows: [His Lordship read the section.] The question is: Has the appellant's failure to obtain employment as surface worker resulted wholly or mainly from the injury? I am clearly of opinion that it has. The injury drove him from the working face and his employment there. He was driven to an unemployed sphere of labour, to use the language of the Act, solely or mainly by the injury. As to that radical fact the opinion of the arbitrator is clear. He expressly finds "that but for the nystagmus from which he was suffering, the appellant would, since December 2, 1926, have been employed as a collier and earning wages at least equal to his pre-accident wages."

It was argued that the arbitrator attributes his plight as a workman solely to labour conditions. This is quite a

mistake. The arbitrator's declaration is that in labour conditions *applicable to surface work* he cannot get employment as a surface labourer. But labour conditions did not drive him into that rank: he was driven into that rank by the accident alone. Labour conditions in the work of a miner at the face are admitted to be such as to give him work and wages as such. Disabled from that work and wages, not by labour conditions but by the accident, he is thrown into a rank in which labour conditions preclude him from earning wages. But those conditions only apply to surface work, not to the work from which he was driven. And it humbly appears to me that the reference to labour conditions of surface work imports nothing to the purpose of this case, for the man's grievance and loss are that he was, from the accident and the accident alone, excluded from a grade where no such adverse labour conditions exist to another in which they do exist. And it is only after this has happened, because of the accident and not because of any labour conditions, that he is put under the range of labour conditions which offer him no opening.

My Lords, I respectfully but firmly dissent.

LORD PHILLIMORE. My Lords, I find myself in agreement with the opinion which has been pronounced by the noble and learned Lord on the Woolsack. If the matter were res integra, I should have been prepared to hold that the words "able to earn in some suitable employment or business," pointed to some personal capacity of the workman, and not to the concomitant circumstances in which he might exercise that capacity. But the matter is not res integra. Unless the reasoning in the opposite direction compelled me, I would not disturb the construction which has been put upon these words since the case of the *Cardiff Corporation* v. *Hall* (1) was decided in 1911. I do not think that there has been any discontinuity in the series of cases which have been decided since. In fact, the only suggestion to the contrary is derived from an obiter expression of the noble Lord now

1) [1911] 1 K. B. 1009.

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on the Woolsack, which he has explained, as it seems to me, correctly in the opinion which he has just delivered.

In *Ball* v. *Hunt & Sons* (1) it was the physical injury which prevented the man from earning money, though that disability was not a disability for work if he could get employment, but one which made him less presentable and therefore less likely to be employed.

But the matter does not rest here. The legislation of 1923, for which the Consolidation Act of 1925 is now substituted, appears to me to recognize the correctness of the decision in *Cardiff Corporation* v. *Hall* (2) as defining the law as it then stood, and to make such amendment of the law as later experience has shown to be desirable, and it appears to me that the workman who claims relief, must bring himself within the terms of s. 9, sub-s. 4, of the Act of 1925.

LORD CARSON (read by LORD PHILLIMORE). My Lords, the Court of Appeal felt bound to follow the decision in the case of the *Cardiff Corporation* v. *Hall.* (2) That case had been fully discussed and considered by that Court as recently as the year 1927 in the case of *Lewis* v. *Guest, Keen & Nettlefold* (3), and where the same argument as we have listened to in this case was put forward—namely, that having regard to the decisions of *Heathcote* v. *Haunchwood Collieries* (4); *Woodilee Coal and Coke Co.* v. *M'Neill* (5); and the *Portland Colliery Co.* v. *Murray* (6)—all decisions of this House—the *Cardiff* case could no longer be considered law. The Court of Appeal refused to accept this view and with that conclusion I entirely agree, and in my opinion there is nothing in any of the decisions expressed in your Lordships' House which prevents us from treating the *Cardiff* case as correct. On the other hand I cannot read the judgments of Lord Loreburn and Lord Shaw in *Ball* v. *Wm. Hunt & Sons* (7) without coming to the conclusion that those noble

(1) [1912] A. C. 496.
(2) [1911] 1 K. B. 1009.
(3) [1928] 1 K. B. 20.
(4) [1918] A. C. 52.
(5) [1918] A. C. 43.
(6) [1923] A. C. 566.
(7) [1912] A. C. 496, 500, 509.

and learned Lords at least approved of the decision. For my own part I would like to say that I do not, even if it is open to do so, for a moment question the soundness of the decision of the majority in the *Cardiff* case. It is unnecessary to go into the reasoning of the learned judges who decided that case in detail, but in my opinion to construe the words " is earning or is able to earn " as creating a liability on behalf of the employer to guarantee work in the case of partial incapacity would be to add provisions of insurance to the Schedule which are not deducible from the language used. But, my Lords, it is unnecessary to pursue this consideration further, having regard to the argument addressed to your Lordships by the learned counsel for the respondents based upon the provisions of the Act of 1923 already quoted. This argument was not considered by the Court of Appeal, as the learned counsel for the respondents was not called upon. Although, holding the views I have already expressed about the *Cardiff* case, it is unnecessary to go further into this argument, I would like to add that I entirely agree with the noble Viscount on the Woolsack that s. 16 of the Act of 1923 seems " necessarily to exclude the idea that ' able to earn ' applies to any circumstances not personal to the man himself." I should like also to point out that, so far as has been suggested to us, it is in this section for the first time that failure to obtain employment is incorporated as an ingredient in making a claim in such a case ; which goes far to show that such or a similar condition is not to be deduced from the language of para. 3 of the First Schedule. My Lords, I agree that this appeal should be dismissed with costs.

LORD BLANESBURGH (read by LORD SHAW OF DUNFERMLINE). My Lords, the facts upon which the claim of the appellant here must rest may be conveniently stated in serial form. So presented they seem to be exceptionally striking. Rarely in such a case are the findings so clear.

1. The appellant's employment at the respondents' collieries was that of a collier or hewer at the coal face—a well known branch of skilled labour with its own rules of working and its own rates of pay.

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2. The appellant in April, 1919, was certified to be suffering from miner's nystagmus, one of the diseases to which the Workmen's Compensation Acts apply. The date of his disablement was April 19, 1919. His " incapacity for work " then commenced.

3. That expression as used in the Act of 1906, expanded, as it must be, by interpretation, means the inability of the disabled workman to earn wages by the work at which he was employed at the date of disablement: see per Lord Macnaghten in *Ball* v. *Hunt & Sons.* (1) It follows that it is in respect of this incapacity, as so defined, and none other that the appellant is entitled, under the statute, to receive compensation.

4. From the date of his disablement down to the hearing of the reference the appellant's " incapacity for work " in this sense had been complete. For him, work at the face had been out of the question, and that solely as a result of his disablement. The appellant " but for his nystagmus from which he suffered would have been employed . . . . as a collier earning at least his pre-war wages " of 2*l.* 13*s.* 3*d.* a week. Such is the finding of the learned arbitrator.

5. It is implicit in that finding, and it is not disputed, that since the termination of the coal strike on December 2, 1926, there was neither labour trouble nor economic stringency effective to interrupt the appellant's employment at his old work had his disablement permitted him to continue it.

6. This, however, has not been the case in relation to the only work which since his disablement the appellant has been capable of doing—namely, surface work—a branch of unskilled labour as well defined as is working at the face a well defined branch of skilled labour. The appellant would have taken and would take any surface work if he could get it. But none such, owing solely to labour conditions affecting the market for this class of unskilled worker, has been available for or obtainable by him. As a consequence the appellant, at the time of the reference had, since December 2, 1926, been idle altogether. His " incapacity for work " in the

(1) [1912] A. C. 496, 500.

statutory sense had been total: and no suitable work of of any other kind was available for him, willing as he was to do it, if it had been.

7. It is agreed that were he able to find employment as such, the wages of the appellant as a surface worker would be 2*l.* 2*s.* 8*d.* a week.

There is not to be found in the *Cardiff* case (1), so frequently referred to in these proceedings, this clear cut divergence in labour conditions between the workman's former work and that to which he was relegated by his disability, and it may well be doubted whether, upon facts which, as in the present case, invest the true meaning of the words " incapacity for work " with a decisive significance, much that was said in *Cardiff* would have been said at all. On the above facts as found, however, the learned arbitrator conceiving, and most probably rightly, that to them the *Cardiff* case applied, and that he was thereby required to charge the appellant in account with the receipt in each week, of the above 2*l.* 2*s.* 8*d.*—although in fact the man had received nothing and had no expectation of receiving anything from surface work—held that the maximum compensation that could be awarded to the appellant was 5*s.* 3*d.* a week—the half to a ½*d.* of the difference between the two sums of 2*l.* 13*s.* 3*d.* and 2*l.* 2*s.* 8*d.* And this was the amount actually awarded. But the learned arbitrator intimated that if he had not been prevented by a decision of the Court of Appeal—*Lewis* v. *Guest, Keen & Nettlefold* (2)—from giving effect to his own opinion that the *Cardiff* case was no longer law his award in favour of the appellant would have been one for 1*l.* a week. The award actually made having been upheld by the Court of Appeal, the first question now—it was originally the only question on the appeal—is whether in the *Cardiff* case, the majority of the Court—Moulton and Buckley L.JJ.—were right when in effect they held that the statute precluded an arbitrator in such circumstances as have been found here from making any higher award than that which is now in question.

(1) [1911] 1 K. B. 1009. (2) [1928] 1 K. B. 20.

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The answer depends entirely upon the meaning to be attributed to the words "able to earn" in para. 3 of the First Schedule of the Act of 1906, already under your Lordships' notice. Do these words refer to the average weekly amount which the disabled workman can earn if he cares and tries, or, do they extend to and include the amount which he is physically fitted to earn in some suitable work, irrespective altogether of whether such work is available for him or not?

My Lords, all concerned have again and again been warned by this House that the language of this statute must be read fairly, taking the words in their common and ordinary signification. So reading this paragraph I cannot think that its meaning is difficult to discover. This portion of it is dealing with cases of partial incapacity—cases, that is to say, of disabled workmen who either may not be altogether unfitted for their old work, or who, if they are, may still remain able to do work of some other kind. And as it is no part of the scheme of the Act that the injured worker, only partially disabled, is to remain in idleness at his employer's expense, and is not, as against the maximum compensation provided, to be charged with his actual or potential earnings during his period of disability, the arbitrator is directed "to ascertain the average weekly amount which he is earning or is able to earn in some suitable employment or business," that is, actual fact, if he is earning or, if he is not earning, estimate of what he is able to earn: see per Farwell L.J. in *Bevan* v. *Energlyn Colliery Co.* (1) And the reason for the alternative form is given by Lord Dunedin in *Heathcote* v. *Haunchwood Collieries* (2), where he explains that it is thereby open to the employer who objects to the figure of actual earnings being taken, to urge and show that the amount the claimant is earning is not really what he might earn if he were to take proper steps to get the most remunerative employment he could find.

It will be noted that there is not here, nor is there in the paragraph itself, a word to suggest that, even by way of

(1) [1912] 1 K. B. 63, 72. (2) [1918] A. C. 52, 56.

estimate, is the workman to be charged with the "average" earnings of any employment or business however "suitable" if neither the employment nor the business was open to him. To my mind, indeed, the fact that it is only with his "*average*" earnings in "*some*" "*suitable*" employment or business that the claimant is by estimate to be charged, shows, if the whole frame and purpose of the clause do not already proclaim it, that there must not only be ability to do the work but an opportunity of getting it, if, in respect of earnings therefrom, the workman is to be charged by way of estimate with any receipt at all.

Mr. Cave did not suggest that the absence of opportunity could never be effectively set up by a workman sought to be charged with earnings not in fact obtainable. He agreed, as I understood him, that the appellant here could not have been charged with such earnings, if there had not been in the district in which he lived or in one to which he would naturally go, an established outlet for surface labour. The *Cardiff* rule had no application to a case where the inability to secure employment in a lower grade was due to the fact that there was no market for such work available to the workman. The assigned reason for that rule made this clear. It is applicable only for the reason that the employer "does not guarantee the state of the labour market" or, as it was put by Buckley L.J., because while the employer under the Act may be called an insurer of "capacity to work": he is not an insurer of a "right to work."

Here then is disclosed the ratio decidendi of the *Cardiff* case, and with the disclosure is revealed, as I believe, the fallacy which underlies it.

In what connection, under this statute, is the statement true that the employer does not guarantee the state of the labour market? Surely, only in this, that, as liability to unemployment is a characteristic of all industrial labour, a workman has no right in this respect by means of compensation to be placed more favourably after the accident than he would have been if he had never met with the accident at all. Accordingly the Courts have held that a workman is not entitled

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to compensation for unemployment due to fluctuations of trade. But, ex necessitate rei, these fluctuations must be and are confined to fluctuations in the demand for "the work in which the injured workman was employed at the time of the accident"—to use again Lord Macnaghten's words in *Ball* v. *Hunt & Sons*. (1) Such fluctuations when they appear in the grade to which the workman is reduced, as a result of the accident, have merely, so far as the statute is concerned, the effect—truly as potent as the worker's actual disability for the work—of preventing him from earning anything in that otherwise "suitable" employment.

Fletcher Moulton L.J. in the *Cardiff* case evidently felt this difficulty, and he seeks to meet it by his illustration of the case of the first class fitter which, as it has been already quoted, I need not again transcribe. But if the Lord Justice had had the advantage we enjoy of Lord Macnaghten's explanation of the phrase "incapacity for work" he could not have said, as in the passage referred to he did say, that all that his first class fitter had lost as a result of the accident was the difference of earning power of a first class fitter as compared with an ordinary fitter. Moreover, he would have found a very good reason why his first class fitter's chance of obtaining employment or his power of earning wages should be treated as different from that of a man who had all his life been an average fitter. Nor could his final statement with reference to the employer's guarantee of the labour market have been made. If the Lord Justice had realized what Lord Macnaghten's subsequent judgment discloses, that it was his fitter's incapacity for work as a first class fitter that was the concern of the statute: that it was for his loss of wages in that work and for nothing else that he was entitled to compensation: that the average earnings from "suitable" work with which his fitter might, in certain circumstances, be charged was work suitable not to a second class fitter but to a first class fitter, the Lord Justice must, as I think, have realized that his illustration, with his judgment founded upon it, disappeared.

(1) [1912] A. C. 496, 500.

At any rate, I reach the conclusion that the judgment of the majority of the Court in the *Cardiff* case (1) was—certainly as applied to a case like the present, where trade depression affected the "suitable" employment only—erroneous and that the correct decision was that enunciated by the Master of the Rolls in words, applicable also to the present case: "I cannot think that the workman should have his compensation reduced merely on the ground that he is physically able to do a different kind of work which in truth cannot be procured."

And this brings me to the second question raised on the appeal—namely, whether the insertion in the Act of 1906 of s. 16 of the Act of 1923 is not the equivalent of a legislative recognition that the principle of the *Cardiff* case now applies to para. 3 of the First Schedule.

My Lords, this question has never before been raised in any case. It is raised now, and, in your Lordships' House too, for the first time. It is true that the respondents, not having been called upon in the Court of Appeal, had no opportunity of raising it there. But they might have taken the point in their printed case and they did not. Never previously alluded to, it was sprung by Mr. Cave upon the House and, I suspect, also upon the appellant in his opening speech for the respondents. In the result your Lordships are called upon to decide a question of far reaching importance unassisted either by the views upon it of the Court of Appeal or by any fully matured reply of the learned counsel for the appellant. In these circumstances I have considered the problem as carefully as I could and I have reached the conclusion, with real misgiving due to the fact that it is not the conclusion of all your Lordships, that Mr. Cave's contention is not tenable.

First of all, my Lords, it is not, I suggest, lightly to be assumed that the Legislature would accept in such a "workman's" Act as that of 1923 a principle which bears upon the workman so heavily, and so illogically as that of the *Cardiff* decision when applied to a case like the present.

(1) [1911] 1 K. B. 1009.

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Even if the learned arbitrator was mistaken in his view that the *Cardiff* case had ceased to be law, it is, nevertheless, I think, difficult for that case and those to which he refers to live quite comfortably together, and it cannot I believe, in any sense, be affirmed that the views of the majority in *Cardiff*, as contrasted with those of the Master of the Rolls, have ever commanded general acceptance. If this judgment has anything to be said for it, they did not deserve that distinction. It is true that the *Cardiff* case has been not infrequently cited but it has usually been referred to for Moulton L.J.'s observations on the "odd lot," and any approval of the case subsequently expressed has been mainly of these observations. When not cited its principle has been more than once ignored.

But approaching the point more closely I observe first of all that s. 16 was enacted alio intuitu. It has been held that the section was passed for the relief and advantage of the workman and has not the effect of depriving him of any rights he had previously possessed. *Clarke* v. *United Steel Companies* (1); *Crossley Brothers* v. *Brunyee.* (2) Its main innovation is contained in the words "wholly or mainly" and it has by these words done two things. It has modified the previous rule that an arbitrator could not give compensation on the footing of total incapacity unless the workman could show that his failure to obtain employment was due *wholly* to his injury. It did, however, something, much more immediately beneficial. By enabling, in certain cases, partial incapacity to be treated as total, the section preserved in being for the benefit of these cases, in respect of an accident occurring on or before December 31, 1923, the provisions of the Workmen's Compensation (War Additions) Acts which otherwise as to them would have been repealed by the Act of 1923.

But further, the section does not, in fact, even for its own purposes, embody the principle of the *Cardiff* case. It requires the applicant to prove that his failure to obtain employment was a consequence "wholly or mainly" of the injury. Under

(1) 18 B. W. C. C 525. (2) (1925) 18 B. W. C. C. 320, 325.

the *Cardiff* principle it was never necessary for the workman in order to escape from its application to his own case to show more than that his failure to obtain employment in suitable work, was *to some extent* a consequence of the injury.

And, finally, and perhaps most important of all, let this be said. As a result of the Act of 1923, the new section, with the First Schedule of the Act of 1906, are now found in the same statute—para. 3 of the Schedule remaining quite unaltered in its terms. The section and the paragraph as in the same Act then deal with different matters in different words and, while, so far as the section is concerned, it might well be expected that, if not quite irrational, its provisions would recognize that before a workman can be treated as retaining the status of *total* incapacity his failure to obtain employment should, at the least, be attributable *mainly* to his injury, there is no plausible reason why in order that an employer should remain liable to compensate a workman in respect of his " incapacity for work " it should in relation to other suitable work be necessary for more to be shown than that such suitable work is not obtainable. In other words, neither in principle nor in outlook nor in result is there any connection at all between the section and the paragraph.

In my judgment, therefore, this new and ingenious suggestion—the first and true invention I cannot doubt of the respondents' advisers—fails them on examination.

On the whole case I would be for allowing the appeal.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 25, 1928.

Solicitors for the appellants: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for the respondents: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

bservations of VISCOUNT DUNEDIN, t p. 78, *applied.* WILSON *v.* FYNN. 1948] 2 All E.R. 40.

[HOUSE OF LORDS.]

H. L. (E.)* 1928 *July* 25.

VISCOUNT TREDEGAR . . . . . APPELLANT;

AND

HARWOOD AND OTHERS . . . . . RESPONDENTS.

Landlord and Tenant—Lease—Covenant—Insurance—Covenant to insure against Fire in named Office "or in some other responsible insurance office to be approved by lessor"—Whether Option given to Lessee to select Office for Approval of Lessor—Refusal of Approval—Reasonableness.

A lease of a messuage for a term of ninety-nine years contained a covenant by the lessee to insure against fire in the following terms: "The lessee shall and will . . . . insure and ever afterwards during the said term keep insured the said messuage . . . . in the joint names of the lessee and lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor. . . . ." The respondent, who was an assignee of the lease, did not continue the policy in the Law Fire Office which was in existence at the time of the assignment, but took out a policy in the Atlas Company. The appellant, who was the ground landlord of the premises and also of a large number of other houses on the same estate, refused to approve of the Atlas Company on the ground that for purposes of estate management he required that all houses upon his estate should be insured in the same office. The respondent declined to insure in the Law Fire Office, and insisted that under the covenant she had an option to insure either in the Law Fire Office or in some other responsible office to be approved by the lessor. In an action brought by the appellant against the respondent, in form for forfeiture of the lease by reason of breach of covenant, but in effect, to obtain a decision of the Court on the construction of the covenant:—

Held (by Viscount Dunedin, Lord Shaw of Dunfermline, and Lord Phillimore; Lord Blanesburgh dissenting), that, upon the true construction of the covenant, the primary obligation of the respondent was to insure in the Law Fire Office, and that the appellant had an absolute right to withhold his approval of an alternative office without entering upon reasons.

Assuming, contrary to the decision of the House, that an implied term was to be imported into the contract that the lessor's approval was not to be unreasonably withheld, the grounds of the appellant's disapproval were reasonable.

Houlder Bros. & Co. v. *Gibbs* [1925] Ch. 575 doubted.

Decision of the Court of Appeal [1928] Ch. 59 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Tomlin J.

* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

(1) [1928] Ch. 59.

The action to which this appeal relates was brought by the appellant against the respondents, Mrs. Harwood and the Principality Building Society, in form, for possession of a dwelling-house in Cardiff demised by the appellant to one Henry Beavis for a term of ninety-nine years by reason of an alleged breach by the respondent Mrs. Harwood of the covenant to insure against fire contained in the lease, but the real object of the action was to obtain a decision of the Court upon the construction of the covenant.

The respondent, Mrs. Harwood, had obtained an assignment of the lease from Beavis, and the demised premises were vested in her for the residue of the term, subject only to a mortgage granted by her to the respondents, the Principality Building Society. At the date of the assignment the premises were insured under the covenant in the lease in the Law Fire Office. The respondent, Mrs. Harwood, insured the premises in the Atlas Company in accordance with a stipulation in her mortgage, and she declined to continue the insurance in the Law Fire Office.

The appellant, who was the ground landlord of a very large number of houses in Cardiff, maintained that upon the true construction of the covenant he had an absolute right to insist that the demised premises should be insured in the Law Fire Office, and that for estate management reasons it was essential that all his lessees should insure in the same office.

The respondent, Mrs. Harwood, maintained that the covenant to insure conferred upon her an option either to insure in the Law Fire Office or in some other responsible office to be approved by the lessor—and the Atlas Company was admittedly a responsible office—and that the lessor could not withhold his approval except for reasons connected with the relationship of landlord and tenant in regard to the subject-matter of the demise.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Viscount Dunedin, and they are summarized in the headnote.

Tomlin J. held, upon the construction of the covenant, that the alternative to the Law Fire Office was subject to the

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conditions that the office was responsible, and that it was approved by the lessor; that the lessor was not bound to give any reasons for his disapproval; and that if it were necessary to consider the reasonableness of his reasons they were in fact reasonable; and he gave judgment for the appellant, but granted relief from forfeiture on the terms that a policy should be taken out within twenty-one days with the Law Fire Insurance Company in the joint names of the appellant and the respondents.

The Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.), on the contrary, held that the covenant conferred an option on the lessee; that the approval of the appellant could not be unreasonably withheld; that on the principle of *Houlder Bros. & Co.* v. *Gibbs* (1) the appellant was precluded from taking into account extraneous or collateral considerations unconnected with the object of the covenant and foreign to the particular subject-matter of the tenancy, and that in no case was he entitled to insist that all the insurances should be effected in the Law Fire Office. They accordingly allowed the appeal and dismissed the action.

1928. May 17, 18. *W. A. Greene K.C.* (with him *Gavin Simonds K.C.* and *Charles Romer*) for the appellant. On the true construction of the covenant it does not confer on the lessee an option to insure in the Law Fire Office or some other office, but imposes upon him an absolute obligation to insure in the Law Fire Office unless the lessor shall have given his approval to some other office, and the lessor is not bound to give any reasons for withholding his approval. At the most he is only bound to act in good faith. There is no ground for implying in the covenant a provision that the approval of the lessor is not to be unreasonably withheld. This the Court will not do unless it is necessary to make sense of the document. Further, if it is necessary for the appellant to show reasonableness his disapproval is reasonable. There is no justification for saying that the appellant is precluded from taking into account extraneous or collateral reasons unconnected with the

(1) [1925] Ch. 575.

relationship of landlord and tenant in respect of the particular property demised. *Houlder Bros. & Co.* v. *Gibbs* (1) is a different case. There the covenant contained a proviso that the consent of the landlord should not be unreasonably withheld, and it was a case of a covenant not to assign—a type of restriction which the Courts have always regarded jealously.

Archer K.C. and *Edgar Foà* for the respondents. Upon the terms of this covenant the lessee has a right to select an office, provided that it is responsible, and the lessor has a corresponding duty to approve. The respondents' case is based upon the words "or other responsible office" and is independent of *Houlder Bros. & Co.* v. *Gibbs.* (1) The lessor is amply protected by the word "responsible." The sole ground on which the lessor can withhold his approval is the want of responsibility of the office put forward by the lessee. In any case the disapproval must not be for some reason wholly unconnected with the office itself. Here the objection of the lessor has no relation whatever to the subject-matter of the contract. The lessor has no right of selection, but the reasons assigned for his objection are reasons for selecting the Law Fire Office and not reasons for disapproving the Atlas. The result is to deprive the lessee altogether of the option conferred by the covenant.

[They also referred to *Dann* v. *Spurrier* (2) and *Burton & Co.* v. *English & Co.* (3)]

W. A. Greene K.C. replied.

The House took time for consideration.

1928. July 25. VISCOUNT DUNEDIN. My Lords, the appellant in this case, Lord Tredegar, is the ground landlord of certain premises known as "Kerswell," 27 Axminster Road, Cardiff. By lease dated July 7, 1924, the appellant demised the said premises to one Henry Beavis and his assigns for ninety-nine years from March 25, 1924, under certain covenants and conditions. One of the covenants is as follows: "That the lessee shall and will immediately after the roof

(1) [1925] Ch. 575. (2) (1803) 4 Bos. & P. 399, 403.
(3) (1883) 12 Q. B. D. 218, 224.

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of the intended messuage shall have been laid on insure and ever afterwards during the said term keep insured the said messuage together with all erections and buildings for the time being erected on the piece or parcel of land hereby demised against loss or damage by fire to the full value of the said erections and buildings in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved of by the lessor and shall upon his request produce to the lessor or his agents for the time being the policy for such insurance and the receipts for the annual payments and that in default of the lessee so doing it shall be lawful for the lessor to insure the said premises and erections and buildings as the lessor may think fit and that the costs and charges of effecting such insurance or keeping the same on foot shall be repaid to the lessor on demand or be recovered in like manner as the rent hereby reserved is recoverable."

The lease contains the usual proviso for re-entry for breach of covenant. By an assignment dated July 29, 1924, the respondent, Mrs. Harwood, became lessee of the premises for the remainder of the term from that date. Henry Beavis duly performed the above quoted covenant and insured the premises with the Law Fire Office for 800*l*. The policy was for one year from March 25, 1924, and the renewal premium became due on March 25, 1925. On March 25, 1925, the respondent, Mrs. Harwood, failed to renew.

By an indenture dated July 30, 1924, the respondent, Mrs. Harwood, had mortgaged the said premises for the remainder of the term in her, excepting the last day thereof, to the respondents, the Principality Building Society. The said mortgage contained a condition that the mortgagor should insure the premises with such office as the society should appoint. The appellant through his agents applied to the respondent, Mrs. Harwood, to either renew the policy issued to Beavis or take out a fresh policy with the Law Fire Office for 800*l*., at the same time intimating that he insisted on the policy being with the Law Fire Office, and would not approve of any other office. The reason for this

intimation was this : Lord Tredegar being the ground landlord of some thousands of houses in Cardiff found it almost impossible, if they were insured in many various offices, to check the due renewals of the premiums. Whereas, if they were all insured in the Law Fire, then by arrangement with that office, they kept his agents informed of any default, so that he might apply for the due renewal of the premium.

The reply of the respondent, Mrs. Harwood, was that by order of the respondents, the building society, she had insured with the Atlas Company. The appellant pointed out that he had not approved of the Atlas. As the respondent at the instigation of the other respondents persisted in her attitude, the appellant raised the present action to forfeit the lease in respect of a breach of covenant. It depended before Tomlin J., and it was explained that there was no intention of really forfeiting the lease if the respondent would insure with the Law Fire for 800*l*. Tomlin J. made a declaration in the appellant's favour, but suspended the decree if within twenty-one days the insurance was effected for 800*l*. with the Law Fire. His view was that if not the Law Fire then any other office could only be accepted under the double condition, first, that it was responsible, and, second, that it was approved by the appellant. He found that the Atlas had not been approved by the appellant and that that ended the matter.

On appeal being taken the Court of Appeal reversed that judgment. They held that the clause gave an option to the respondent ; that on proposing an office which was responsible —no question having been raised as to the responsibility of the Atlas—the appellant had no right to refuse his approval on any ground which did not directly affect the contract between him and the respondent.

My Lords, I am quite unable to concur with the learned judges of the Court of Appeal. It seems to me that they introduce complication and inference into an expression where there is no room for one or the other. It was admitted by the learned counsel for the respondent that if the word " responsible " had been omitted, it would have been impossible to say that any office could be properly tendered which had

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not been approved by the appellant. I think it is a quite impossible burden to put on the word "responsible" to change all this. The reason for the existence of the word is simplicity itself. It was necessary to put in some alternative to the Law Fire, because this was a ninety-nine years' lease, and before the end of it it might be that the Law Fire did business no longer. It might be liquidated or bought up. Then some other office had to be selected. No office that is not responsible is to be entertained, but, however responsible, it is to be approved by the appellant. The learned judges relied on the case of *Houlder Bros.* (1) But in that case, as is pointed out by Tomlin J., there was the special proviso that consent to the assignment was not to be withheld in the case of a responsible person. Further, I would like to say, that although it is unnecessary to consider whether that case was well decided, I am not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. I should read reasonableness in the general sense, and if it was necessary—it is not so in the view already expressed—I would hold here that the appellant's reasons are eminently reasonable.

I move that the appeal be allowed, that the judgment of Tomlin J. be restored with the variation that the twenty-one days therein mentioned do run from the date of this judgment instead of the date of the judgment of Tomlin J., and that the appellant should have his costs in this House and in the Court of Appeal.

LORD SHAW OF DUNFERMLINE. My Lords, the facts of this case are not in dispute. The respondent, Mrs. Harwood, by assignment became lessee of these premises—a plot of land with some buildings on it—for the remainder of the term of a ninety-nine years' lease by the appellant in favour of one Henry Beavis.

The indenture of lease to Beavis and his executors, administrators and assigns contains a covenant for insurance and rebuilding in the case of fire. The insurance was to be

(1) [1925] Ch. 198; 575.

" in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor." There follow the ordinary clauses about production of the policy and the annual receipts for premiums, and there was later in the indenture a proviso for re-entry in case of breach of covenant.

The main obligation upon the lessee or his assignee was to insure in the Law Fire Office or, in the alternative, in some other responsible insurance office to be approved of by the lessor.

No conditions or provisions are attached to the granting or withholding of this approval. In particular, the case is in that respect completely distinguished from various cases as to assignment or sub-letting which have been cited. These contain, for example, the not unusual clause as in *Houlder Bros. & Co.* v. *Gibbs* (1), that the consent of the landlord was " not to be withheld unreasonably in the case of a respectable and responsible person or corporation " being put forward as assignee, or the other not unfamiliar clause applicable also to assignment or sub-letting, as in *Barrow* v. *Isaacs & Son* (2), to the effect that the consent of the landlord " should not be arbitrarily withheld."

In the present case no such restriction or condition upon the right of approval or disapproval by the landlord is imposed. The case is the simple one of one sound office being named, with the alternative given of another responsible office approved by the lessor. If the lessee will not insure in the Law Fire Office nor in any other responsible office which the lessor has approved, the covenant is broken. It is a condition precedent to the alternative being resorted to that the lessor's consent has been given to the other office suggested. I am of opinion in these circumstances that this condition precedent cannot be removed or held as satisfied, because in the opinion of a court of law the lessor's refusal was unreasonable. The Court's opinion upon that subject cannot be allowed to supply the want of the lessor's consent in fact.

The forms of contract, under which the reasonableness of withholding consent is made a term, are perfectly familiar,

(1) [1925] Ch. 575. (2) [1891] 1 Q. B. 417.

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Lord Shaw of Dunfermline.

and they were not adopted in the present case; and the condition of the lessor's consent is a condition precedent in absolute terms.

The judgment of the Court of Appeal is, in my humble opinion, wrong in two particulars. It imports the implication of a new clause into the contract:—that the consent of the lessor to any responsible insurance office selected by the lessee is not to be unreasonably withheld: and, secondly, having imported by implication a clause in those terms, the Court then proceeds to attach to these terms and to this contract all that certain authorities hold is the further implication of such a clause, namely, that the lessor must furnish a justification for his refusal, and further that such a justification must be something incidental to the individual contract itself and also to the financial standing or responsibility of the alternative insurance company. I am humbly of opinion that this process of piling implication upon implication is not a legitimate mode of construing a very simple and plain condition. It is clogged neither by the one implication nor the other.

Were it necessary to inquire, then the facts of this case would show that there were sound business reasons behind this unfettered simplicity. The lessor was the owner of many hundreds of houses erected under building leases, and the development of a considerable estate required strict attention to, among other things, the insurance of the buildings erected. The difficulty in such cases is to check the failure in renewals. With properties so numerous, and insured, it may be, in a dozen different offices, this point of management becomes very complex, and, in this case, it is pointed out that the cost involved becomes considerable. By a simple working arrangement with one office, such as the Law Fire, simplicity and accuracy are promptly secured.

I put the point, my Lords, of the situation of a person in Lord Tredegar's position with contracts of insurance by numerous offices offered, the names of which are the alternatives suggested by various tenants out of the many hundreds. It does not appear to me that any duty is cast upon a lessor to enter into or obtain information upon the

financial situation or standing of the offices suggested, although, if the judgment appealed from were to stand, each lessee of each house could demand of Lord Tredegar an answer justifying refusal to consent, an answer which was of the nature of reasons against the financial responsibilities of a particular office. This kind of issue is totally different from the issue which arises in sub-letting cases with a specific term against unreasonable refusal of a sub-tenant. I cannot hold that, under the present contract, the refusal to consent is clogged in the manner suggested.

On the merits I should, further, hold, if the matter were gone into, that the refusal here was perfectly reasonable, and that it would be wrong to confine the reason in such case to the particular house exclusive of all considerations as to the management of the estate to which it belonged. Nor would it, in my view, be in the second place reasonable to cast upon the landlord the proponing of a suggestion of the instability of an insurance company suggested by the lessee. The lessor might know that company quite well, feel that it was a strong office, but an office with which, in his past dealings, he had every reason to know was litigious, dilatory or difficult to deal with : it would yet, however, remain under the category of a responsible office.

I take, however, the absolute view of this case to the effect that the lessor's consent is a condition precedent in fact to the acceptance of an alternative insurance office, and that that consent can be refused simpliciter without entering upon reasons. I agree.

LORD PHILLIMORE. My Lords, I agree with the opinions given by the noble and learned Lords who have spoken. Two persons each sui juris and under no constraint, enter into an agreement. Why should we not give effect to the plain words of their agreement ? Why should we seek for some far-fetched meaning ? Moreover, if it were a question, which it is not, whether Lord Tredegar was, in seeking to enforce the agreement, acting reasonably, I should say that he was so acting. I share the doubt expressed by Lord

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Dunedin as to the soundness of the judgment in *Houlder Bros. & Co.* v. *Gibbs*. (1) If it be a question whether a man is acting reasonably, as distinguished from justly, fairly, or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect somebody else.

In the first draft of my opinion I had stopped at this point. But as I find that there is an argument (not based upon supposed grounds of policy or fairness, or the previous practice of the landlord, but strictly founded upon the literal construction of the words) which still finds some favour in your Lordships' House, it would be more respectful if I give my reasons for not accepting it.

I construe the covenant thus: No. 1. The tenant covenants to insure against fire; No. 2. He covenants to insure in the Law Fire Office unless as an alternative both parties agree to some other office. No office can be substituted for the Law Fire Office except by mutual agreement. The tenant would fulfil his covenant if he insures in the Law Fire Office, even though the landlord did not wish it. The landlord on the other hand can say that he will approve of no office except the Law Fire. I regard the word "responsible" as monitory. It would be of no use for you, the tenant, or for you the landlord, if you have taken a dislike to the Law Fire, to suggest any office of doubtful repute.

The idea that the introduction of the word "responsible" affects or increases the duty of the landlord to the tenant, seems to me, with all respect, fanciful. During the course of the argument, I made the suggestion: substitute for the word "responsible" the word "English." Would that enable a tenant to say, I am complying with the covenant because I am tendering an office which is not Scotch, nor Irish, but English, and which you, therefore, must approve unless you can show good reason to the contrary?

LORD BLANESBURGH (read by LORD SHAW OF DUNFERMLINE). My Lords, the question in this case is a simple one. It is

(1) [1925] Ch. 575.

not, for that reason, easy. Tomlin J. thought the language of the clause in debate was plain, or, at any rate, reasonably plain. His decision was for the appellant. The unanimous conclusion of the Court of Appeal on the other hand was in favour of the respondents. Lawrence L.J. expressing a view, clearly enough shared by his two learned colleagues, observed in the course of his judgment: "I confess that but for the opinion expressed by the learned judge and the arguments of counsel for [Lord Tredegar], I should have thought that the construction did not present any real difficulty."

My Lords, I regret that that divergence of judicial opinion has not yet entirely disappeared. But while I hope that I appreciate fully the considerations which have led your Lordships who have preceded me to revert to the view of Tomlin J. I feel bound to say, with the utmost respect, that my own opinion remains in accord with that of the Court of Appeal.

It is surely superfluous to affirm that this conclusion in no way underrates either the reasonableness or wisdom from his own point of view of the appellant's recent resolve to have effected in one office all the insurances upon his Cardiff leases. Nor, when I regard the services, clerical and otherwise, to be rendered to him in consideration by the Law Fire Office, do I doubt that the appellant has chosen prudently in selecting that office as his favoured medium of insurance. I should equally commend his wisdom if, as a result of the tender of even more valuable services, the appellant were, later on, to transfer his insurance favours to some other responsible office, say, for example, the Atlas. But it is not his prudence in either direction which is relevant now. The question is whether under the insurance covenant in the respondent, Mrs. Harwood's, lease, Lord Tredegar can require her to insure in the Law Fire Office, to the exclusion, under all circumstances, of any other.

It must, I think, be conceded that the admissibility of such a requirement is beset by at least some initial difficulty. There is a well known common form covenant which would indubitably have established the privilege claimed. It has not been

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utilized. The covenant chosen as the estate covenant is an equally well known alternative style, to some extent it must be agreed—how much is here the question—more favourable to the lessee than the other. And that the choice of this less stringent form of covenant was deliberate ceases to be unlikely when it is remembered that in a building estate to be developed largely by advances made by building societies and other lenders to the lessees a covenant convenient to the lenders may be of final advantage to the ground landlord. Certain, at all events, it is that no such policy as that recently adopted by the estate was in view when the covenant was selected. The arrangement with the Law Fire Office which, having been come to, has, quite prudently, led to the requirement now made by the appellant is a new thing. But the covenant unaltered has been in use on the estate for many years, and throughout that period the view of it still taken by the respondents has in practice always been accepted and acted upon by the appellant. As appears from the correspondence, very many of the houses on the estate have been built with moneys advanced by the respondent building society to lessees on the security of their leases, and the society, for reasons analogous to those now moving the appellant, has always required its mortgagor lessees—as in this case it required Mrs. Harwood—to effect their insurances with the Atlas, which, as a responsible office, has been accepted by the estate without question.

It may, of course, be retorted that this action on the part of the appellant's representatives was no more than an indulgence which the appellant was not concerned, as things stood, to withhold from his tenants. It is accordingly pertinent to observe that in circumstances not unlike the present the covenant would certainly be unequal to the burden the appellant now seeks to place upon it.

Suppose, as has already been suggested, that the appellant were to find it to his interest to have all these insurances effected with some office other than the Law Fire. It cannot, in that case, I think, be doubted that he would nevertheless be bound to accept, as a complete performance

in that behalf of the lessee's covenant, an insurance with the Law Fire, if tendered. Suppose again, that for some reason the Law Fire disappeared or were absorbed in some other office. The appellant could not in that case require a lessee to insure in an office of his own nomination, for the privilege of nomination is not reserved to him. And if the appellant, desirous of confining insurances to one office, were to disapprove of every other office as submitted to him, however responsible or unobjectionable in every way, some at all events of the offices submitted might be, that action on his part I cannot doubt would be held unwarranted on the well known principle explained and applied by Tindal C.J. in *Dallman* v. *King*. (1) The gist of the covenant is that the office selected by the lessee and tendered for approval shall be responsible. To withhold approval therefore from every responsible office but one, and that for some reason entirely irrelevant to insurance protection, would go to the destruction of the thing granted and, " according to the well known rule, the thing granted would pass discharged of the condition."

My Lords, the alternative form of covenant which would have resolved all these questions in the appellant's favour is a very simple one, and it will be found, with variations in detail, in every standard book of precedents. By its terms the lessee covenants to insure " in such insurance office as shall be named by the lessor," or " in such office as the lessor shall appoint." Indeed in this very covenant you have, in apt words, power reserved to the appellant, in case of default by the lessee, to realize his will in this matter. He is in that event empowered " to insure the said premises . . . . as [he] may think fit." The aptness, for the same purpose of the covenant exacted by the respondent building society in Mrs. Harwood's mortgage of July 30, 1924, will not be missed. Thereby Mrs. Harwood covenants to " insure and keep insured the said premises . . . . in such office and for such amount as the society shall appoint."

The contrast between the present covenant and any one of these alternatives leaps to the eye. Here the lessee is, as

(1) (1837) 4 Bing. N. C. 105, 109.

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I think in plain language, given the option of fulfilling his obligation in one of two ways, either (*a*) by insuring in the Law Fire, or (*b*) by insuring in some other responsible insurance office to be approved by the lessor. The only preference enjoyed by the Law Fire Office is that it is a responsible office of which no further approval by the lessor is required. There is nothing in the covenant which either necessarily or naturally imports that the alternative is only exercisable if insurance in the Law Fire is impracticable. To introduce that qualification, some such words as "failing that office" would have to be added, and they are not to be found in the covenant. The choice of the other office rests with the lessee: the approval only is with the lessor, not the selection, and the right of the lessor is limited to considering and approving or declining to approve the responsible office so chosen. It is here that the addition of the word "responsible" to the description of the office chosen for approval is so illuminating. Unless the name of a responsible office is tendered the lessor need not consider the proposal at all. No step towards compliance with the covenant has so far been taken. Insurance in a responsible office is the gist of the covenant. It is only when in exercise of his privilege of selection the name of a responsible office is tendered by the lessee that the correlative duty of approval or disapproval by the appellant arises, and it arises immediately.

The action of the appellant in relation to the respondents' insurance with the Atlas was significant. Really, he definitely refused to consider the case of any insurance office except the Law Fire. At the best his refusal to approve the Atlas was attributable not to any objection on the ground of responsibility or otherwise to that office, but to a preference for the Law Fire or to the fact that the Atlas was not the Law Fire. Be it so. The appellant's position is not, as I see it, thereby improved. For, however unrestricted may be his legitimate grounds of objection in other directions, the action of the appellant in withholding approval on any such ground cannot, on the true meaning of the covenant, be justified. As

Lawrence L.J. puts it in his judgment, the avowed action of the appellant "amounts to a complete negation of the right of the lessee to fulfil his obligation under the covenant by insuring in some responsible office other than the Law Fire. The lessor is, in effect, treating the covenant as if it were a covenant to insure in the Law Fire only and as if the alternative method of complying with it had not been inserted." The consequence is not far to seek. The appellant by declaring that in no circumstances will any office other than the Law Fire be entertained by him has brought it about that the respondents' insurance in the Atlas, an admittedly responsible office, is, in the result, a compliance with the covenant, inasmuch as the covenant on this occasion must, owing to the appellant's attitude in relation to that insurance, be regarded as "discharged of the condition."

In my judgment it is only under some other form of words and not under this covenant that the appellant is entitled to the right which here, for the reason assigned, he has claimed to exercise. On these grounds, if the decision rested with me, I would be for affirming the order of the Court of Appeal.

Order of the Court of Appeal reversed and judgment of Tomlin J. restored with a variation that the twenty-one days therein mentioned do run from the date of this order instead of from the date of the judgment of Tomlin J. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 25, 1928.

Solicitors for the appellant: *Rider, Heaton, Meredith & Mills, for Davis, Lloyds & Wilson, Newport.*

Solicitors for the respondents: *Church, Adams, Tatham & Co., for Merrils, Ede & Nicholls, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.)* 1928 *Oct.* 30.

MEDWAY OIL AND STORAGE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

CONTINENTAL CONTRACTORS, LIMITED, AND OTHERS . . . . } RESPONDENTS.

Costs—Taxation—Claim and Counterclaim—Dismissal of both, with costs.

Where a claim and counterclaim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of special directions by the Court there should be no apportionment. The same principle applies where both the claim and the counterclaim have succeeded.

Saner v. *Bilton* (1879) 11 Ch. D. 416; *Crean* v. *M'Millan* [1922] 2 I. R. 105; and *Wilson* v. *Walters* [1926] 1 K. B. 511 approved and followed.

Christie v. *Platt* [1921] 2 K. B. 17 explained and distinguished.

Decision of the Court of Appeal [1928] 1 K. B. 238 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of MacKinnon J.

The facts are fully stated in the report of the case before the Court of Appeal. The following summary may be found useful.

The respondents sued the appellants for 62,000*l.* as damages for wrongfully repudiating a contract to accept and pay for a large quantity of kerosene oil which the respondents had sold to the appellants; and the appellants counterclaimed for the difference between the contract and market price of the oil, on the ground that the respondents had themselves wrongfully repudiated the contract of sale.

The respondents did not make the first delivery at the stipulated time, but they alleged (1.) an oral agreement to

* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD CARSON, and LORD BLANESBURGH.

[*Note.*—The late VISCOUNT HALDANE presided at the hearing and prepared a written judgment, which was read by VISCOUNT DUNEDIN.]

(1) [1928] 1 K. B. 238.

postpone delivery for a month; (2.) that the appellants' tanks were not ready to receive the oil at the contract date of delivery; (3.) that the giving of a bankers' guarantee called for by a clause of the contract was a condition precedent to the respondents' obligation to ship and deliver; (4.) that a conspiracy had been entered into between the appellants and the respondents' suppliers to defeat the respondents in their efforts to obtain the oil.

The appellants denied these allegations.

MacKinnon J. held that the respondents had failed to establish any of their allegations, and dismissed their claim with costs. He also dismissed the appellants' counterclaim with costs, on the ground that, though the appellants were justified in treating the contract as having been repudiated by the respondents, they had suffered no damage.

The judgment of the learned judge on the merits was ultimately affirmed by the House of Lords.

On taxation of the costs of the litigation the Taxing Master, for the purposes of obtaining a ruling as to the principle to be applied, reported that he proposed to tax on the assumption that each party had been completely defeated on his affirmative claims.

MacKinnon J., applying the principle of *Wilson* v. *Walters* (1), held that the only costs which the respondents could recover as costs of the counterclaim were such costs as they incurred by reason of the counterclaim and would not have incurred apart from the counterclaim, e.g., the costs of calling a witness as to the market price.

The Court of Appeal (Bankes, Atkin and Lawrence L.JJ.) held, on the principle of *Christie* v. *Platt* (2), that all the matters in issue arose upon the claim and upon the counterclaim, and that the costs of all must be apportioned.

1928. April 30; May 1, 3. *Van den Berg* (with him *R. L. Parry*) for the appellants. The Court of Appeal were wrong in saying that all the four issues were common to the claim and counterclaim and that therefore there must

(1) [1926] 1 K. B. 511. (2) [1921] 2 K. B. 17.

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be an apportionment. All the issues arose solely upon the claim, and the costs of those issues were properly incurred in defeating the claim and should be given to the appellants. The only costs that should be allowed to the respondents on the counterclaim are such extra costs as were incurred by reason of the counterclaim and would not have been incurred but for the counterclaim: *Wilson* v. *Walters*. (1)

Cyril Atkinson K.C. (with him *Roland Burrows*) for the respondents. The broad proposition laid down in *Wilson* v. *Walters* (1) is inconsistent with *Christie* v. *Platt* (2) and ought to be overruled. Where the same matter arises on the claim and counterclaim and one party gets the costs of the claim and the other party gets the costs of the counterclaim the costs of litigating the matter ought to be apportioned between the parties, and it is for the Taxing Master to determine what the apportionment should be. The respondents' costs of litigating the matters in controversy were incurred in resisting the counterclaim as well as in supporting the claim, and the appellants' costs were not incurred solely in resisting the claim but were also incurred in supporting the counterclaim. Where cross-claims arise between two parties the principle on which the costs are to be taxed cannot depend upon which of the two comes in first with his writ. The respondents' contention that the costs of issues common to both claim and counterclaim should be apportioned is supported by *Baines* v. *Bromley* (3) and *In re Brown*. (4)

[He also referred to *Saner* v. *Bilton* (5); *Mason* v. *Brentini* (6); *Shrapnel* v. *Laing* (7); *Atlas Metal Co.* v. *Miller* (8); *Haskell Golf Ball Co.* v. *Hutchinson* (9); *Jones* v. *Stott* (10); *Fox* v. *Central Silkstone Collieries* (11); *Crean* v. *M'Millan*. (12)]

Van den Berg replied.

The House took time for consideration.

(1) [1926] 1 K. B. 511.
(2) [1921] 2 K. B. 17.
(3) (1881) 6 Q. B. D. 691.
(4) (1883) 23 Ch. D. 377.
(5) 11 Ch. D. 416.
(6) (1880) 15 Ch. D. 287.
(7) (1888) 20 Q. B. D. 334.
(8) [1898] 2 Q. B. 500.
(9) [1906] 1 Ch. 518.
(10) [1910] 1 K. B. 893.
(11) [1912] 2 K. B. 597.
(12) [1922] 2 I. R. 105.

1928. Oct. 30. VISCOUNT DUNEDIN. Before his lamented death Viscount Haldane had prepared a judgment in this case and, as the conclusion he arrived at is the same as that which will be arrived at by the vote of the House, in accordance with precedent I propose to read his judgment.

VISCOUNT HALDANE. My Lords, I think that the real question in this case in the main is one of law. It relates to the principle which ought to prevail in the taxation of costs when the successful defendants to an action have put in a counterclaim and have been defeated on it with costs. In this action the appellants, who were defendants, succeeded in defeating with costs a claim for a very substantial sum. This was the effect of the judgment of MacKinnon J., who tried the case. His judgment on the merits was reversed by the Court of Appeal, but subsequently restored by this House. There was controversy over the result arrived at by the Taxing Master when taxing the costs under the judgment. There was an appeal to MacKinnon J. from his order and subsequently a further appeal to the Court of Appeal. That Court altered the order, and it is from the judgment thus altering it that the present appeal is brought. The costs, as directed in the end to be taxed, appear to have finally resulted in 987*l.* 9*s.* 11*d.* being awarded to the respondents, the plaintiffs who failed, as costs of the trial, and in 1808*l.* 4*s.* 3*d.* being given to the appellants as like costs. The respondents have been given 288*l.* 6*s.* 2*d.* for the costs of the appeal and the appellants have been awarded 583*l.* 19*s.* 10*d.* for such costs.

The amounts in issue, even as to costs alone, are thus substantial. The large amount of costs awarded to the respondents, who failed in their action, but succeeded on the defence to the counterclaim, arises from the decision given that, no damage having been shown to have been caused by them, they were, although in breach, entitled to judgment on the counterclaim with costs. The amount of the costs ultimately allocated to the counterclaim is the result of the application of a principle which MacKinnon J. refused to

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adopt, but which the Court of Appeal has applied. The view of the Court of Appeal is that where the plaintiff fails with costs in his claim and the defendant with costs in his counterclaim, the proper mode of taxation is not, as MacKinnon J. thought, to give the defendant all costs incurred in resisting the claim, depriving him only of any costs which he has incurred exclusively in supporting his defeated counterclaim. In that view no question of what is called apportionment can arise. The Court of Appeal has on the contrary held that where evidence is given of facts which are put forward in connection with the claim and the counterclaim in common, there is no reason why the plaintiff should not be allowed the costs incurred in relation to them when resisting the counterclaim on which he has got judgment, and the duty of the taxing master is to apportion the amounts when taxing the entire costs.

My Lords, there is a real divergence in the working out of the two principles, notwithstanding that there are cases in which it is impracticable to rely on either as an abstract principle standing by itself. One brief may, for instance, be given to counsel on both claim and counterclaim, and it may obviously be necessary that there should be an apportionment of the single inclusive fee paid with it. But in most other cases no such difficulty arises. It is therefore necessary to turn to the character of the litigation in the present case to see whether it comes within the character that is not exceptional, so that the principle adopted by MacKinnon J., if indeed it be right as a matter of law, can be applied.

The respondents sued the appellants to recover damages for an alleged breach of contract to take delivery as purchasers of a large quantity of oil. The appellants succeeded in establishing that the respondents had failed to make delivery of the oil in due time under the contract, and they counterclaimed as damages the difference between the contract and market prices of the oil, alleging that the respondents had themselves wrongfully repudiated their contract of sale. The action was tried before MacKinnon J., who gave judgment

on the claim of the respondents as plaintiffs for the appellants (defendants) with costs, and on the counterclaim for the respondents with costs. The respondents appealed to the Court of Appeal, and the appellants cross-appealed against the dismissal of the counterclaim. The Court of Appeal reversed the judgment of MacKinnon J. and gave judgment for the plaintiff respondents for 44,738*l.* 6*s.* 8*d.* with costs, including the costs of the appeal as well as of the cross-appeal, which was dismissed. The appellants then appealed to this House, which reversed the order of the Court of Appeal and restored that of MacKinnon J. The judgment of the latter had been that judgment be entered for the defendants (the present appellants) with costs and that judgment be entered for the plaintiffs on the counterclaim with costs of the counterclaim. The ground assigned by MacKinnon J. for dismissing the counterclaim was that it was not shown that the defendants had suffered any damage by reason of the plaintiffs having failed to fulfil their contract, and that the latter were therefore entitled to have the counterclaim dismissed and with costs, if there were any separate costs of the counterclaim. [The judgment of this House reversed that of the Court of Appeal and restored the judgment of MacKinnon J.] There was no reversal of the judgment as regards the counterclaim, the dismissal of which by MacKinnon J. with costs therefore stands.

My Lords, it becomes necessary to ascertain what the matters put in issue and tried really were. As to this all the Courts are in substantial agreement. The issues were four in number: (1.) Whether there was an agreement, as alleged by the plaintiff respondents, to extend the time for delivery of the oil. This has been finally disposed of in favour of the appellants by the judgment here. (2.) Whether the appellants' tanks were ready to receive the oil at the contract dates of delivery. (3.) The questions arising with reference to the guarantee. (This was an agreement contained in clause 6 of the original contract under which the buyers were, if so required, to give the sellers a floating bankers' guarantee for their payments to their own vendors in respect of a certain

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amount of the oil to be delivered under the contract.) (4.) The allegation of a conspiracy by which it was said that the appellants sought to arrange with the Russian sellers that the latter should fail to supply the respondents with oil, so that the appellants could get out of their contract, and then deal directly with the Russians. [On this again the appellants have finally succeeded.] All these issues were decided in favour of the appellants. MacKinnon J. considered the first, the third and the fourth arose solely on the claim. The second, which related to the tanks being in readiness, he thought was relevant on both the claim and the counterclaim, but that, as the appellants had succeeded on that issue, the respondents were entitled only to such extra costs arising in connection with it as were occasioned by the counterclaim. The appellants were, in his opinion, entitled to the costs of this issue which they had actually incurred in defending the action, and the respondents were entitled only to such costs as they would not have incurred had they not been compelled to meet the counterclaim.

It is at this point that the Court of Appeal overruled the learned judge on the question of taxation. They held that there was a substantial claim and a substantial counterclaim arising out of the same contract, and that, except as to the amount of the damages respectively claimed, all the substantial contentions on either side were common to both claim and counterclaim. There was no reason why the respondents should not be allowed costs incurred in resisting the counterclaim merely because the facts they put forward were common to both claim and counterclaim. The Taxing Master ought, they held, to have apportioned to the counterclaim such portion of the common items as had arisen and been incurred by reason of the counterclaim.

My Lords, there is obviously here a conflict of opinion with MacKinnon J. about a point of principle. One view is that as the costs of the issues were, as the Taxing Master found, properly incurred in defeating the claim they should be given to the appellants, the respondents getting only such extra costs as were incurred by reason of the counterclaim

and but for it would not have been incurred. The other view is that the proper principle of taxation under a judgment such as the judgment in this case is that when one party has got the costs of a claim and another of a counterclaim, the Taxing Master ought to allow to each party all such costs as he has properly incurred in maintenance or resistance, as the case may be. When therefore the matters in controversy are common to both claim and counterclaim, the costs, so far as common to both claim and counterclaim, should be apportioned.

The question is one which, as might be expected, has on a good many occasions come before the judges, and is of a kind, being one of the practice of the Courts, in which what they have laid down is of much importance, although the decisions are not technically binding in this House. I propose therefore to examine the most important of the authorities.

In 1879 Fry J. decided *Saner* v. *Bilton*. (1) There the plaintiff's claim and the defendant's counterclaim had, as here, both been dismissed with costs. The question was whether the defendant ought to pay only so much of the costs pertaining to the claim as were occasioned by the counterclaim, or whether the costs of all the proceedings which related to both claim and counterclaim should be apportioned. Fry J. consulted some of the most eminent of the Taxing Masters, who advised against apportionment. He afterwards gave a considered judgment, in which he said that analysis of the practice before the Judicature Act threw but little light on the question before him. The true view seemed to him to be that the plaintiff having begun the litigation, and the counterclaim having only arisen in it as a consequence, the claim should be treated as if it stood by itself, and the counterclaim should bear only the amount by which the costs of the proceedings had been increased by it. Special directions might be given by the Court which would vary the application of the rule, but in a case where both claim and counterclaim were simply dismissed with costs, there should be no apportionment, and no question of quantum arose.

(1) 11 Ch. D. 416.

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In 1880 the Court of Appeal, consisting of Jessel M.R. and James and Brett L.JJ., took the same view in a similar case (*Mason* v. *Brentini* (1)), Jessel M.R. saying that he entirely agreed with the decision in *Saner* v. *Bilton* and with the reasons given by Fry J., and that the judgment of the latter was to be considered as expressing the rule of the Court.

Baines v. *Bromley* (2) was decided in 1881 by the Court of Appeal, consisting of Bramwell, Brett and Cotton L.JJ. The circumstances of the case were different in this respect that the plaintiff had recovered on his claim with costs, and that the defendant had recovered a larger amount with costs on a counterclaim. The Court of Appeal, however, held that, the case not being one of set-off but of counterclaim, the proper course was to take the claim as if it and its issues were an action, and the counterclaim and its issues as though also an action. In such a case Brett L.J. observes that if there were items common to both actions the Taxing Master would divide them. But he did not explain what were the sort of items in which this would be so. Bramwell and Cotton L.JJ. proceeded simply on the ground that the plaintiff being declared entitled to his costs of suit had been wrongly allowed only the costs of the issues on which he succeeded.

In re Brown (3) was decided in 1883 by Chitty J. and then by the Court of Appeal (Baggallay, Cotton and Fry L.JJ.). The plaintiff had succeeded on a claim and the defendant on a counterclaim, the latter recovering the larger amount. Each obtained an order for the costs. It was contended before Chitty J. that there ought to be apportionment. But that learned judge, whose experience in such matters was very great, held that the principle of *Saner* v. *Bilton* (4) applied where the plaintiff who had commenced the litigation was wrong, and that it must also apply where the plaintiff was right and the counterclaiming defendant was also right. The effect of the Judicature Act was to make two writs

(1) 15 Ch. D. 287.
(2) 6 Q. B. D. 691.
(3) 23 Ch. D. 377.
(4) 11 Ch. D. 416.

unnecessary, but the plaintiff was to recover none the less the whole costs of the claim in the action. He referred to the dictum of Brett L.J. in *Baines* v. *Bromley* (1) about the Taxing Master dividing items common to both actions, and said that on inquiry he was unable to find that there had been made any apportionment, notwithstanding the observation in the Court of Appeal. His own view appears to have been that there could be no apportionment in the absence of special direction. The Court of Appeal took the same view as Chitty J. The Lords Justices thought that the principle of *Saner* v. *Bilton* (2) applied, just as much where claim and counterclaim both succeeded as where they both failed.

In *Shrapnel* v. *Laing* (3), decided in 1888, in the Court of Appeal (Lord Esher M.R. and Fry and Lopes L.JJ.), the same principle was applied. The plaintiff had recovered on his claim and the defendant on a counterclaim, both with costs. It was sought to deny to the plaintiff the general costs of his action, because the amount recovered on the counterclaim was larger. But the Court ordered the taxation to proceed as though the claim were an action in itself and the counterclaim also an action, to be treated as though there had been no claim. If either of the parties fails in particular issues his costs will be to that extent disallowed, but they will not belong to the other side. Lord Esher M.R. explained his dictum in *Baines* v. *Bromley* (1) about the Taxing Master dividing common items as limited to items of which both parties get the advantage. Of these he said there were very few, the costs of the writ which includes the whole of the proceedings might be one.

In *Atlas Metal Co.* v. *Miller* (4) Lindley M.R. in the Court of Appeal reviewed the authorities in a careful judgment. He threw some doubt on the dictum of Lord Esher M.R. in *Baines* v. *Bromley* (1) about common items, and said there could not be included in the costs of a counterclaim any costs not occasioned by its being a counterclaim but saved

(1) 6 Q. B. D. 691.
(2) 11 Ch. D. 416.
(3) 20 Q. B. D. 334.
(4) [1898] 2 Q. B. 500, 505.

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by its being what it is. There can be no apportionment of what are properly costs of the action. Such costs where ascertained must be paid by the party ordered to pay them.

This judgment of the Court of Appeal obviously follows the principle of *Saner* v. *Bilton* (1), and makes it clear that "no costs," to use the words of Lindley M.R., "not incurred by reason of the counterclaim can be costs of the counterclaim." Lindley M.R. and Chitty L.J. laid down that the cases were in reality in agreement in the following points: (1.) A plaintiff who is to pay or be paid the costs of his action must pay or be paid the whole of such costs as if there were no counterclaim. (2.) The defendant who fails on his counterclaim has to pay all the costs of it, the counterclaim being treated as an independent action. What do these costs include? The costs occasioned by it, and these only. The circumstance, for instance, that if there had been no action the costs of the counterclaim would have been larger, because the defendant would then have had to issue a writ, does not make costs not incurred costs incurred, and the costs saved by not bringing a separate action cannot be regarded as costs incurred. Where there are no separate issues requiring special treatment the costs of the defence will be costs of the action, and so with the counterclaim also. Costs common to defence and counterclaim must necessarily be dealt with on this principle, but to apply it is a very different thing from apportioning what are properly costs of the action.

My Lords, in the authorities which I have now cited successive Courts of Appeal have laid down a principle which is not only intelligible, but capable of being easily applied by the Taxing Master. It may work out apparently harshly in exceptional cases. But when these threaten to occur the remedy is to apply at the trial for special directions as to issues and details. The advantage of the principle is that it is a definite one, which lifts the subject out of the somewhat vague regions of apportionment.

(1) 11 Ch. D. 416.

So the law had been settled since 1898, the year of the judgment in the *Atlas* case. (1) Even the minor questions suggested by Lord Esher M.R. had been superseded, partly by the decisions of other judges and partly by his own subsequent observations.

But in 1920 a change of attitude seems to have disclosed itself in the Court of Appeal. *Christie* v. *Platt* (2) was an interlocutory appeal decided by Atkin and Younger L.JJ. To a claim by a landlady for rent against her tenant, the latter had pleaded that the demised premises, a furnished house, were uninhabitable. By way of counterclaim the tenant had repeated the allegations in her defence and claimed damages. Judgment was entered for the landlady on her claim for 200*l.* and costs, and for the tenant on the counterclaim for 225*l.* and costs. On each side the claim and counterclaim were dealt with in one brief. The Taxing Master allowed the plaintiff the fee to counsel at the trial and costs and expenses of witnesses. In taxing the defendants' bill of costs he allowed nothing in respect of these items. The Court of Appeal held that the taxation had proceeded on a wrong principle, and that the costs incurred in supporting the claim and opposing the counterclaim ought to be apportioned, and attributed to the costs of the claim and the counterclaim respectively. So mutatis mutandis with the cost of supporting the counterclaim and opposing the claim.

My Lords, in the particular circumstances of *Christie* v. *Platt* (2) it was no doubt tempting to deal so with the costs. I share the sense of Atkin L.J. that there was something in the result of the taxation which on the face of it must have been wrong. For although the defendant had recovered the larger amount on what was a cardinal question between the parties, the plaintiff was given on her case, which was practically uncontroverted, 214*l.*, while the defendant only got 3*l.* 0*s.* 5*d.* to cover the whole of her costs. I agree with Atkin L.J. that this must have been wrong. There were obviously costs incurred in common; the single fee on the brief given by the plaintiff is an example. It may be that

(1) [1898] 2 Q. B. 500. (2) [1921] 2 K. B. 17.

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this fee would not have been too much if there had been no counterclaim to meet. But that does not affect the fact that it was paid to the plaintiffs' counsel to cover his services in both proceedings. It ought therefore to have been divided for the purposes of taxation. The same thing appeared to have been true of a good deal of the evidence put forward on the two sides. There may well be costs which have to be divided. In the *Atlas* case (1) Lindley M.R. at one point uses the word "apportioned," but that is where he is quoting Lord Esher M.R. on another point. He himself goes on at once to say that while costs common to both claim and counterclaim must necessarily be dealt with in this way, "to do so is very different from apportioning what are properly costs of the action. Such costs when ascertained must be paid by the party ordered to pay them. They cannot have been increased by the counterclaim, and no part of them can properly be regarded as costs of the counterclaim."

My Lords, the distinction between division and apportionment may in certain circumstances be a thin one. But under the rule as laid down by Lindley M.R., and by the judges in the earlier case also, the distinction is fundamental. I do not criticize the result reached in *Christie* v. *Platt* (2) by Atkin and Younger L.JJ. But I do find in their judgment some failure to recognize the importance of the distinction and to lay emphasis on it.

In a case in Ireland, *Crean* v. *M'Millan* (3), the question raised in cases such as *Christie* v. *Platt* (2) was considered by the Courts, which contained three Lords Justices, the Lord Chancellor and the Master of the Rolls, the case being finally disposed of by them on appeal in what was then the High Court of Appeal for Ireland. O'Connor L.J. delivered a judgment which is as valuable as it is instructive, and there were exhaustive opinions expressed by the Lord Chancellor of Ireland and Andrews L.J. They disposed of the question as to how the costs should be borne when there was a counterclaim in accordance with the principle initiated by *Saner* v.

(1) [1898] 2 Q. B. 500, 506. (2) [1921] 2 K. B. 17.
(3) [1922] 2 I. R. 105.

Bilton (1), and finally laid down by Lindley M.R. There are expressions in the judgments which I should myself avoid, such as " apportionment." In using them they were obviously influenced by the expression used in *Christie* v. *Platt* (2), for they do not lay stress on the difference in principle of the *Atlas* case (3) between apportionment and division.

In *Wilson* v. *Walters* (4) Scrutton and Sargant L.JJ., sitting as a Divisional Court only, had the following case before them. The plaintiff brought an action in the county court for damages caused by the negligent driving of the defendant's motor car. The defendant denied negligence and counterclaimed for negligent driving by the plaintiff. The county court judge gave judgment on the claim for the defendant with costs, and on the counterclaim for the plaintiff with costs. The registrar in taxing first gave the defendant the costs of the claim. He then gave the plaintiff only such extra costs as were incurred in defending the counterclaim. Where in the latter case he came to an item which had been already dealt with in the costs of the claim he gave the plaintiff nothing in respect of it. But on appeal to the county court judge the latter held that whenever there was an item common to both claim and counterclaim it should be apportioned, believing that in so holding he was following *Christie* v. *Platt*. (2) The Divisional Court allowed the appeal. They held that the issues on the claim and the counterclaim were one and the same. The defendant who succeeded was therefore prima facie entitled to the whole costs of determining them. The defendant on the other hand could recover on his counterclaim only such extra costs as represented the costs of the proceedings, as increased by the putting in of the counterclaim. In so holding they treated themselves as following the authorities from *Saner* v. *Bilton* (1) down to the *Atlas* case, and also the judgments of the majority in the Irish case of *Crean*.

My Lords, the principle applied in *Wilson* v. *Walters* (4) may have consequences in individual cases which would be

(1) 11 Ch. D. 416.
(2) [1921] 2 K. B. 17.
(3) [1898] 2 Q. B. 500, 506.
(4) [1926] 1 K. B. 511.

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harsh if the Taxing Master did not supervise the costs of claim and counterclaim closely, and split up the costs of items which are required by both. In such instances he takes an item, a single fee on the plaintiff's brief for example, and splits it into two notional fees, the one attributable to the claim, and the other to the counterclaim. This is not an apportioning, in which the payment is treated as a single item and the question is to what it is attributable. It is in reality a notional division of what on the face only of it is one item. If the principle is not kept in mind confusion will follow, as was pointed out by Lindley M.R. and other judges.

I now come to the judgment which we have to examine in the appeal before us. The learned judges of the Court of Appeal agreed neither with the Taxing Master nor with MacKinnon J. In their order they expressed the opinion that with the exception of the issue whether or not there was an agreement to postpone deliveries, which the parties admitted to arise solely on this claim, all the other issues raised in the pleadings and at the trial were common to both the claims and the counterclaims. I pause to observe that this is not only contrary to what was found by MacKinnon J. who tried the case, but is impossible to reconcile with the judgment of the Lord Chancellor in this House. The counterclaim raised another issue, which there is no need to consider, inasmuch as the counterclaim for wrongful repudiation was dismissed with costs.

The order of the Court of Appeal went on to direct the Taxing Master to allow the respondents (the plaintiffs) all costs properly in fact incurred by them in defending the counterclaim, and to allow the appellants (defendants) all costs properly in fact incurred by them in defending the action, and directed that all common items be apportioned in the discretion of the Taxing Master accordingly. The direction given by MacKinnon J. was in effect that when, as here, the defendant has succeeded in his defence but failed in his counterclaim he is entitled to the costs which he has actually and properly incurred in defeating the claim

(including in this case the costs of the issues mentioned), but is not entitled to any costs which he would not have incurred had he not counterclaimed. The plaintiffs are only entitled to such costs as they would not have incurred had they not been compelled to meet the counterclaim.

The view taken in the Court of Appeal was very different. "In considering," said Bankes L.J. (1), "what the real contest between the parties under each of these heads" (the issues) "was, I do not think that justice can be done except by treating the costs of the litigation under each head as costs which must be apportioned if the order as to costs is to be complied with." Atkin L.J. (2) says that "It appears to me wrong both in law and fact to say that when a man sues for 62,000*l.* and is sued in counterclaim for 46,000*l.*, and the event is to be determined by consideration of the same evidence, he incurs all the costs of evidence because of the claim. He seems to me obviously to incur the cost because of both; in other words the costs are occasioned by both. And it is quite irrelevant as to such costs to consider what he would have incurred if there were no counterclaim, that is with no other cause operating. The result of the rule now laid down is that where there is a substantial counterclaim involving common evidence, the Master will apportion. But apportion does not necessarily mean divide into equal moieties. He will decide how much in fact should be attributed to the claim; how much to the counterclaim." He thought that the statement of Fry J. in *Saner* v. *Bilton* (3) that the plaintiff was to be represented as letting loose the waters of litigation, and therefore if unsuccessful should be in a worse position than an unsuccessful counterclaimant, unsatisfactory.

Lawrence L.J. concurred, being of opinion that the authorities disclosed no consensus of view. He followed what was laid down in *Christie* v. *Platt.* (4)

My Lords, the judgments in the Court of Appeal appear to me to go back in spirit as well as in letter on the series of

(1) [1928] 1 K. B. 238, 251.
(2) Ibid. 255.
(3) 11 Ch. D. 416.
(4) [1921] 2 K. B. 17.

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decisions by Fry J., Jessel M.R., Lindley M.R., and other eminent judges whose opinions I have already examined. The purpose of these opinions was to find a principle which might extricate the law relating to taxation in cases like the present from the hopeless confusion in which Fry J. found it. The successive decisions, down to *Christie* v. *Platt* (1), established a principle which in individual cases may seem a hard one. But it is a clear one, and in most cases will operate justly, as was pointed out by Fry J., while in others the Taxing Master can correct the effect of applying it in isolation as an abstract rule, by dividing items as distinguished from apportioning general costs. Such as it is, the rule was one necessary to lay down in some form, and I think that the form in which it has been laid down here and in Ireland was adopted by the learned judges, who did so because practice and authority alike pointed to it as the proper one.

I am therefore of opinion that we must reverse the judgment of the Court of Appeal and restore that of MacKinnon J. The appellants should have their costs here and below.

LORD CARSON. My Lords, we have the advantage of knowing from the judgment of MacKinnon J. who tried the case that his view at the end of the trial was that the plaintiffs should only receive "such costs as are occasioned by the counterclaim," and I am not surprised that when on the order as framed the taxation of costs resulted in 900*l.* being awarded to the defendants and 1700*l.* to the plaintiffs the result was, as the learned judge has said, "exceedingly startling." In point of fact the defendants had won on every issue, whether considered as an issue on the claim or on the counterclaim, and only failed in obtaining judgment upon the counterclaim by reason of their being unable to prove any damage flowing from the breach of contract which they had succeeded in proving.

Amongst the issues raised was a charge of fraud against the defendants with reference to what has been shortly

(1) [1921] 2 K. B. 17.

described as the conspiracy with the Russians. This issue was found in favour of the defendants, but they have been ordered under the taxation appealed from to pay the whole of the costs of such issue as costs of the counterclaim. The mere statement of such an injustice is of itself sufficient to demonstrate that the taxing officer must have acted upon some erroneous principle. My Lords, I have been unable myself to understand how, after the judgment in *Atlas Metal Co.* v. *Miller* (1) already referred to, which is a judgment of the Court of Appeal and was reported as far back as 1898, any Court felt entitled in such a case as the present one to disregard the principles laid down in that case, and which, so far as I am aware, have been generally applied in cases of the failure of a counterclaim when there were no special directions found necessary. The noble Viscount Lord Haldane examined all the authorities, and it is unnecessary for me to refer to them in detail. I think the judgments referred to by the noble Viscount in *Crean* v. *M'Millan* (2), which were delivered in a case on all fours with the present one, are well worthy of perusal, and I would like specially to refer to the summary of conclusions arrived at by Andrews L.J., which, taken as a whole, fairly represent the principles to be deduced from the various authorities and apart from special circumstances.

My Lords, I think MacKinnon J. stated the principle applicable to this case very shortly when he says: "I think the proper principle to apply is that which is stated in *Wilson* v. *Walters* (3), namely, that where a matter arises both on the claim and the counterclaim the plaintiffs are only entitled to such extra costs as were occasioned by the counterclaim." I agree with the noble Viscount Lord Haldane that the use of the word "apportion" is likely to be misleading. I am not sure I understand in the present case what it means or on what principle it can be adjusted. For example, upon the issue of fraud to which I have referred, found in favour of the defendants, how are the costs to be "apportioned" as between the plaintiffs and the defendants

(1) [1898] 2 Q. B. 500. (2) [1922] 2 I. R. 105.
(3) [1926] 1 K. B. 511.

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and so with the other issues? Such a method of dealing with the costs seems to impose upon the Taxing Master a duty in the exercise of which he is afforded no guidance whatever. I agree that this appeal should be allowed and that the judgment of MacKinnon J. should be restored.

LORD BLANESBURGH. My Lords, I was party with Atkin L.J. to the decision of the Court of Appeal in *Christie* v. *Platt*. (1) I am free, however, to confess that until the full discussion of that case on this occasion I was not conscious that there lurked in its judgments the pronounced departure now suggested from the rule of taxation enunciated in such authorities as *Saner* v. *Bilton* (2); *Mason* v. *Brentini* (3); and *Atlas Metal Co.* v. *Miller* (4)—a rule which, for brevity's sake, it may be convenient to refer to as the rule in *Saner* v. *Bilton*. That no departure from the rule was, at least consciously, made in *Christie* v. *Platt* (1) perhaps sufficiently appears from the fact that the three cases just mentioned were all of them cited or referred to by Atkin L.J. in his judgment, and on their effect was rested the order then pronounced. I do not, however, at this stage further refer to this aspect of *Christie* v. *Platt*. (1) I reserve that for later consideration. What I desire to call attention to now was the fundamental misunderstanding of the *Saner* v. *Bilton* rule disclosed in *Christie* v. *Platt* (1) and corrected by that decision. *Christie* v. *Platt* (1) so regarded is, in the circumstances of the present case, as I see them, a completely reliable guide to the solution of this appeal.

The action was one by a landlady against her tenant of a furnished house for 200*l.* rent due. By her defence, the tenant, after a formal traverse of the tenancy agreement, alleged in a series of paragraphs that the demised premises were uninhabitable. In a counterclaim, she repeated, by reference, these paragraphs of her defence, and concluded with a claim for damages. The defendant's allegations were denied by the plaintiff. By the time of the trial, it

(1) [1921] 2 K. B. 17.
(2) 11 Ch. D. 416.
(3) 15 Ch. D. 287.
(4) [1898] 2 Q. B. 500.

had become clear, if indeed it was ever in doubt, that the alleged condition of the premises was no defence to the claim for rent. The plaintiff's case in support of that claim was accordingly confined to proof of the tenancy agreement and of the rent due thereunder. That proof given, and the evidence was not questioned, she left the defendant to make good her allegations if she could. A full hearing ensued, with an examination of witnesses on both sides, and, in the result, Sankey J. found it to have been an implied term of the tenancy agreement that the demised premises should be reasonably fit for occupation, that they had not been so in fact, and that the defendant had suffered damage in consequence. He gave judgment for the plaintiff on the claim for 200*l.* and costs. On the counterclaim he gave judgment for the defendant for 225*l.* and costs. The Master taxed the costs. "To state his conclusion," says Atkin L.J. (1), "is enough to show that there is some flaw in his reasoning. He has taxed the plaintiff's costs at 214*l.* 5*s.* and the defendant's costs at 3*l.* 0*s.* 5*d.*; and the defendant, who won on the issue involving nearly all the expense, is allowed 3*l.* while the plaintiff who succeeded on an unopposed allegation recovers 214*l.* That must be wrong." How very wrong is perhaps even more strikingly apparent when it is remembered that the bulk of the plaintiff's 214*l.* represented her costs of a disputed issue on which she had entirely failed, and that no part of her costs of the same issue on which she had succeeded was allowed to the defendant.

The explanation of the Taxing Master's action (and it was on this that the question before the Court turned) may again be given in Atkin L.J.'s words: "He reasoned thus: The defendant pleaded the breach of the implied term as a defence to the plaintiff's claim for rent; therefore the expense of proving the breach is attributable to the claim. The result of this reasoning is that he has imputed these costs to an irrelevant plea and has allowed them no part or share in establishing a relevant and substantial counterclaim. This has produced a miscarriage of justice."

(1) [1921] 2 K. B. 24, 26.

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The Lord Justice pointed out the remedy. The directions as to taxation given in the cases cited were all subject to this overriding condition which, expressed in the terms applicable to the case in hand, was that there must be ascertained what were the costs really incurred by the plaintiff in establishing her claim and what were those really incurred by the defendant in establishing her counterclaim. The taxation was accordingly referred back to the Taxing Master to ascertain these matters and award accordingly.

My Lords, the effective decision in *Christie* v. *Platt* (1) emerges, I think, very clearly from this statement. And it is very apposite here. It is that in determining for the purposes of taxation in such a case as this whether a particular issue is an issue on the claim or on the counterclaim or on both the claim and the counterclaim, the Taxing Master is not by any rule in *Saner* v. *Bilton* to be enslaved by the form of the pleadings. The question must be determined as one of substance and not of form—the manner in which the action was fought and in which the issues were dealt with by the parties and the Court not being disregarded. On the facts in *Christie* v. *Platt* (1) the Master was to be entitled, indeed he was invited, to attribute to the counterclaim exclusively all costs really incurred by the defendant in maintaining the disputed issue, although that issue had first appeared in the defence and was introduced to the counterclaim only by reference to the defence.

In that sense of the decision, applying it to the present case, I would, with the liberty thereby conceded to me, inquire with reference to all of the four issues here in debate, whether the costs incurred in relation to them, be they the costs of the appellants or of the respondents, were costs really incurred on the claim or its defence, or on the counterclaim or its defence, and I cannot myself doubt the answer to be that these costs were all of them incurred in relation to the claim and none of them in relation to the counterclaim.

It will of course be remembered that their claim was prosecuted by the respondents not only up to judgment,

(1) [1921] 2 K. B. 17.

but as far as the Court of Appeal, and this inquiry must be so directed as to ascertain what in relation to these issues was the position and what was the risk of the two parties litigant, in a case so conducted.

To begin with the appellants, their position, I cannot doubt, was that unless they succeeded at the trial in establishing their allegations with regard to each of the four issues, judgment for the respondents on the claim must follow, while their own counterclaim would never arise. Further, when that counterclaim did become effective it would be a proceeding in which these issues would no longer remain as issues. They would already have been decided in the action in the appellants' favour.

As to the respondents, their position, conversely, may be stated with equal ease. Until they had established their allegations with reference to some one of the issues their claim in the action could not prevail. When however they had so far progressed then not only did their claim in the action succeed but, as a necessary corollary, the counterclaim against them at once disappeared.

The correctness of this view was well illustrated in the fortunes of the respondents' appeal from the judgment at the trial. Before the Court of Appeal they contended that as to one of the issues—that in relation to a guarantee—their view was right, and that by their contract they were under no duty to deliver, until the guarantee had been given. The Court of Appeal accepted that contention, with the result that, without more, the respondents' claim in the action was decreed and the appellants' cross-appeal from the order dismissing the counterclaim, was, without discussion, dismissed. The counterclaim had automatically collapsed.

To me therefore it appears clear that it was impossible, in the litigation as conducted, for these issues to arise on the counterclaim at all.

My Lords, it was on this view, taken by the learned judge at the close of his judgment, that he gave to the respondents their costs of the counterclaim. His assumption was that these costs, apart from any divided costs not here in debate, would carry only their costs of the question as to the appellants'

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damages which was peculiar to the counterclaim. By his present order he has, although by a somewhat different road, in substance reached the same result. For myself, I would be content to restore that order, for the reasons just given.

But, my Lords, other views of these issues have been taken. Lawrence L.J., for instance, is of opinion that, albeit in differing degrees, they are each one of them common both to the claim and the counterclaim. This also is in substance the view of Atkin L.J. The learned trial judge again is now of opinion that so much may truly be said of one issue, and some of your Lordships may possibly share one or other of these views.

I accordingly proceed to ascertain whether, even so, that ought to affect the result which I have reached on the other footing. The question now is whether on this fresh hypothesis the rule of taxation to be applied is that in *Saner* v. *Bilton* (1), or whether, as the Court of Appeal have held, that rule should now be displaced in favour of one which would apportion, between the claim and the counterclaim, the costs of all issues common to both.

Upon this question it is quite academic to inquire whether it was open to the Court of Appeal, now, for the first time, at least avowedly, to depart in this matter from the rule in *Saner* v. *Bilton* (1) and, in effect, overrule *Wilson* v. *Walters* (2), which had recently adopted it. I say this, because your Lordships are here quite untrammelled by authority and are in a position to choose for application now and for the future the rule which seems to be best.

And with the rest of your Lordships I am satisfied that no reason had been shown why the rule in *Saner* v. *Bilton* (1), which has so long stood, should be departed from. Now that I have had the opportunity for full consideration that rule appears to me to be preferable to its proposed substitute. In its application to the present case, for instance, its operation is in every way satisfactory. Apart from any application of Order LXV., r. 2, it gives to both parties their costs of matters in which they have been respectively successful and leaves them liable only for the costs of those

(1) 11 Ch. D. 416. (2) [1926] 1 K. B. 511.

in which they have failed, in contrast with what would be the result of the apportionment rule—namely, that of the issues on which the respondents failed, not excepting that of fraudulent conspiracy, they would receive from the appellants a proportion of their costs of defeat while the appellants would themselves have to bear a proportion of their own costs of success. The fresh taxation shows that the modification made by the Court of Appeal on the principle of taxation followed by the Master has greatly qualified the amazing figures reached by him. But the improvement is still one of degree only, and I share with my noble and learned friend opposite his condemnation of the result. Moreover I am satisfied that such an outcome of the application of the apportionment rule would not be peculiar to the present case. It would, in a measure, always result from it.

But to that rule there is, I think, a further fundamental objection. I am not myself satisfied that those who favour its adoption have been sufficiently deterred by the difficulties in the way of its application. It is, as has already been pointed out, one thing to divide as between claim and counterclaim expenses incurred with reference to both, e.g., counsel's fees. It is quite another thing to apportion between the two the costs in relation to an issue common to both. If, as an example, I may again refer to the respondents' costs of the issue of fraudulent conspiracy, how with any result capable of rational justification could their costs of that charge which failed be apportioned between the claim and the counterclaim? I know not. And so, even if in less degree, of the other issues.

My Lords, Mr. Atkinson did raise one objection to the rule in *Saner* v. *Bilton* (1) which struck me as forcible. A rule, he said, is in principle wrong, which depends for its result so much upon the accident which of the two parties in a case like this, first commences proceedings. So far as regards the present litigation the criticism did not strike me as serious, because it is plain from even a superficial consideration of the learned judge's judgment at the trial that if in this litigation the appellants had, instead of the respondents, been plaintiffs,

(1) 11 Ch. D. 416

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while he might have dismissed both claim and counterclaim—although I greatly doubt whether in such a litigation he would have adventured to dismiss the claim—it is certain that by reference to issues or in some other way he would have brought about the result as to costs which his judgment shows he intended and which, as at long last appears, he has achieved by the order he made in the action as now framed.

But, my Lords, I cannot doubt that Mr. Atkinson's criticism of the *Saner* v. *Bilton* (1) rule is well justified in its application to some cases. *Wilson* v. *Walters* (2) may perhaps be referred to as one of these. The objection, however, is less serious than it looks. There is no obligation on the judge in such cases to dismiss both claim and counterclaim *with costs*. For the future he will presumably only do so when he is satisfied that an order in that form when worked out will in substance effect the result he desires. As Fry J. said in *Saner* v. *Bilton* (3) "the Court can in every case give special directions which may vary the rule" and this appeal will not be without permanent utility if it brings home to learned judges the necessity, in cases like these, of adjusting critically their orders as to costs if these orders are not sometimes to produce results at once unintentional and unjust.

On the whole case I am of opinion that the order appealed from should be discharged and that of MacKinnon J. restored.

VISCOUNT DUNEDIN. My Lords, I am glad that in this case there is no difference of opinion between my colleagues who are members of the English Bar. I should have been sorry indeed to have been compelled to give a casting vote on a point which is essentially one of English practice. I may however permit myself two observations. The result at which your Lordships have arrived seems to me the only result which is consistent with the justice of the case. Further, had the same case arisen in Scotland, where the whole practice as to the form of interlocutors dealing with expenses, and the duties of the auditor thereon arising, is quite different—a practice which it is not hujus loci to describe—the result would have been the same as that which is now attained.

(1) 11 Ch. D. 416. (2) [1926] 1 K. B. 511.
(3) 11 Ch. D. 419.

LORD SHAW OF DUNFERMLINE. My Lords, I feel thoroughly satisfied with the analysis of the decisions affecting this point of English practice, made by the noble and learned and lamented Viscount who occupied the Woolsack during the hearing and whose opinion has been read.

In the course of the able address of Mr. Van den Berg, counsel for the appellant, I put to him a question in order to test in the concrete what were the real topics of contest between the parties on which cost had been incurred. There is a book of the evidence led and of the documents produced in this litigation. It measures 832 pages. My question was: How much of that was occupied with matter relevant to or necessitated by the counterclaim? The answer was that out of the 832 pages only ten were so occupied. The learned counsel for the respondent very faintly challenged this proportion and thought ten pages to be rather too slender an allowance.

To deal with such a case on the footing adopted by the Court of Appeal would manifestly lead to a state of matters in which the counterclaim costs awarded would bear no real relation to the costs which the counterclaim actually caused. The other course, and that now proposed, will very largely avoid such a result; and it is, I cannot doubt, the course supported by the main body of authority in England. I agree to the motion to be submitted to the House, and I may be allowed to add further that I concur in the observations of Lord Dunedin.

Order of the Court of Appeal reversed, and judgment of MacKinnon J. restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Oct. 30, 1928.

Solicitors for the appellants: *Cosmo, Cran & Co.*
Solicitors for the respondents: *Dehn & Lauderdale.*

[HOUSE OF LORDS.]

H. L. (E.)* 1928 July 26.

ENGLISH INSURANCE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

OFFICIAL RECEIVER AND LIQUIDATOR OF NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED . } RESPONDENT.

Insurance (Marine)—Company—Winding Up—Proof of Debt—Agreement between two Insurance Companies—Participation in Profits and Losses—Absence of Stamped Policy—Rejection of Proof—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 91, 92, 93—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 22, 23.

By an agreement between two insurance companies, the E. Company and the N. Company, therein described as a participation agreement, it was (inter alia) provided that the N. Company should be entitled to and accept a quota of a one-eighth of all risks accepted by the E. Company through its marine department. The participation was fixed at 50 per cent. of the share retained by the E. Company at its own risk of all marine assurances accepted on or after a specified date, with a maximum limit on any one ship. The liability of the two companies was to commence automatically at the same time, the expressed intention being that the two companies should participate pari passu in all marine insurances accepted by the E. Company. The N. Company was to be entitled to a proportionate part of the net premiums and other benefits received by the E. Company and was to bear its proportionate share of losses. The E. Company was alone to settle all claims which might arise under its policies and the N. Company was to be bound by the settlement. The E. Company was to receive from the N. Company commissions on the net premiums and on the profits derived by the N. Company from the whole of the business under the agreement. By another clause in the agreement the N. Company was absolutely bound in every case to follow the fortunes of the E. Company. No stamped policy of assurance was ever issued to the E. Company by the N. Company in respect of any risk coming within the agreement. The N. Company having been ordered to be wound up by the Court, the E. Company claimed to prove in respect of certain claims arising under the agreement. The liquidator disallowed the claim:—

Held, that the agreement was a contract for "sea insurance," and not being expressed in a duly stamped policy was invalid as not complying with the requirements of the Stamp Act, 1891, and the Marine Insurance Act, 1906.

Held, therefore, that the proof of the E. Company was rightly rejected.

Decision of the Court of Appeal [1928] Ch. 74 affirmed.

Per Lord Atkin: *Semble*, inasmuch as the effect of the existing law

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, and LORD ATKIN.

is to make it impossible for a marine insurance company to secure in advance that its risks shall be fairly distributed by re-insurance policies by any form of contract which can be enforced in a Court of law, this is a matter which might reasonably be considered by the Legislature.

APPEAL from an order of the Court of Appeal affirming an order of Eve J.

The question raised by the appeal was whether the appellant company, the English Insurance Company, Ld., was disentitled from proving in the liquidation of the National Benefit Assurance Company, Ld. (hereinafter called "the National Company"), in respect of claims arising under the agreement next hereinafter mentioned by reason that no stamped policies of marine insurance were issued to the appellant company by the National Company as regards any matters falling within that agreement.

On January 17, 1922, an agreement called a participation agreement was entered into between the appellant company (thereinafter called "the Company") and the National Company (thereinafter called "the Participator.")

Art. I. provided as follows: "The Participator shall be entitled to and shall accept a quota participation equal to a one-eighth share of all and every risk, after deduction of amounts locally re-insured, and whether written direct or by way of re-insurance from other companies or underwriters, but excluding obligatory re-insurance agreements with other companies arranged by the Head Office of the Company, upon any marine insurance or upon any war risks, whether alone or in conjunction with marine risks, accepted by the Company . . . . through the marine department of the Company at 23 Birchin Lane, London, E.C. 2. The expression 'marine insurance' as used in this agreement shall include all forms of insurance, including war risk and re-insurance, which are or may be transacted by the marine department of the Company."

Art. II. provided that the above participation should be equal to 50 per cent. of the share retained by the Company at their own risk of all marine insurances accepted on and after January 1, 1920; that the maximum limit of the

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Participator by any one ship should in no case exceed 1875*l.*; and that any special re-insurances effected by the Company of risks within the scope of the agreement should be for common account of the parties thereto.

Art. III. provided as follows: "The liability of the Participator shall commence automatically at the same time as that of the Company, and any cover given directly or indirectly by the Company shall immediately become binding on the Participator, the intention of this agreement being that the Company and the Participator shall participate pari passu in all the marine insurances including war risks accepted by the Company . . . . through its marine department."

By Art. IV. the Company was not to be obliged to furnish the Participator with any particulars in regard to the risks accepted and the Participator was to be entitled to receive monthly statement of the premiums and losses only. The Participator was, however, to be at liberty to inspect all books and papers appertaining to the marine business in which it was interested under the agreement.

Art. V. provided that the Participator should be entitled to a proportionate part of the net premiums, salvages and other benefits received by the Company and should bear its proportionate share of all losses; but if, owing to the failure of the original assured, the Company was unable to collect the premium on any risks ceded under the agreement, the Participator agreed to waive its right to receive its proportion of such premium from the Company.

Art. VI. provided that the Company should alone settle all claims which might arise under its policies, and that in no case should the Participator have the right to interfere with settlements, but should be bound thereby.

Art. VII. provided for the payment to the Company of a commission of $2\frac{1}{2}$ per cent. on the net premiums paid or allowed to the Participator in respect of its participation, and a commission of 10 per cent. upon the profits derived by the Participator from the whole of the business under the agreement.

Art. VIII. provided for the rendering of quarterly accounts by the Company.

Art. IX. was as follows: "This agreement shall take effect from the First day of January One thousand nine hundred and twenty, but may be terminated as at the 31st December of any year by either party hereto giving the other party not less than six months' notice in writing; but it is nevertheless understood and agreed that such notice shall not affect the liability of the Participator for any current or unexpired risks accepted hereunder until the expiry thereof. It is, however, understood and agreed that the Company may at any time after default by the Participator in payment of any sums payable by the Participator to the Company under this agreement by notice in writing require the Participator to pay to the Company the sum so owing, and if the Participator shall not pay such sum within seven days the Company shall be entitled to cancel this agreement immediately by giving written notice to that effect; and at any time after the termination of notice under this agreement the Company shall have the right by notice in writing to cancel the participation of the Participator in the whole or any part of the then current and/or outstanding marine business, in which case the Participator shall pay to the Company the pro rata return premiums."

Art. X. provided as follows: "This being an agreement executed in a spirit of trust one with the other the Participator is absolutely bound in every case to follow the fortunes of the Company. It shall not prejudice the Company if it should accidentally happen that it has incorrectly advised or omitted to advise the Participator of any particulars relating to this agreement. . . . ."

The provision in the agreement as to relation back had reference to the fact that an arrangement similar to that embodied in the participation agreement, having effect as from January 1, 1920, had formerly been in force between the appellant company and the London and Yorkshire Insurance Company, and that the position of the latter company under that arrangement had been taken over by the National Company on September 23, 1921.

Throughout the currency of this agreement many risks coming within its terms were accepted by the appellant

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company and were dealt with according to the provisions therein contained. No stamped policy of insurance was ever demanded by the appellant company or issued to it by the National Company in respect of any risk coming within the terms of the agreement. On July 25, 1922, the National Company was ordered to be wound up by the Court, and the Official Receiver was appointed the liquidator thereof. The appellant company claimed that an account fell to be taken on the terms of the agreement alone, and that in taking such account the appropriate share of losses on risks accepted by them and falling within the terms of the agreement was to be debited to the National Company. This claim was disallowed by the liquidator of the National Company on the ground that no stamped policy of sea insurance was ever issued to the appellant company by the National Company.

An application by the appellant company to set aside the rejection of their proof by the liquidator was dismissed by Eve J. The learned judge was of opinion that the participation agreement was a contract for sea insurance and was invalid in that it did not comply with the provisions of the Stamp Act, 1891 (s. 93), or the Marine Insurance Act, 1906 (ss. 22 and 23).

The Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.) affirmed the decision of the learned judge.

The arguments on behalf of the appellant company sufficiently appear from the judgments. The respondent's counsel were not called upon.

Porter K.C. and *Andrewes-Uthwatt* for the appellants.

Dunlop K.C. and *L. W. Byrne* for the respondent.

LORD HAILSHAM L.C. My Lords, this is an appeal against an order of the Court of Appeal affirming an order of Eve J., which upheld the decision of the Senior Official Receiver that the appellant company was not entitled to prove in the liquidation of the National Benefit Assurance Company, Ld., in respect of claims arising under an agreement in writing made between the appellant company and the National

Benefit Assurance Company, and dated January 27, 1922. That agreement, which was described as a participation agreement, provided that the National Company should be entitled to, and should accept, a quota participation equal to a one-eighth share of all and every risk underwritten by the appellant company. By art. II. it was provided that the participation should be equal to 50 per cent. of the share retained by the appellant company at their own risk of all marine assurances accepted on and after the first day of January, 1920, with a limit of 1875*l.* on any one ship. The agreement went on to make provision that the appellant company should alone settle all claims which might arise under its policies, and that the National Company should have no right to interfere with settlements but should be bound thereby. The appellant company was to have commissions on the net premiums and on the profits derived by the National Company from the business under the agreement. Accounts were to be settled and paid quarterly. By art. IX. the appellant company was given a right, upon default in punctual payment, to give seven days' notice in writing to the National Company requiring payment of the amount due, and if the National Company did not pay within seven days the appellant company was entitled to cancel the agreement immediately by giving written notice to that effect; and it was further provided that, at any time after the termination of notice under the agreement, the appellant company had the right to cancel the participation of the National Company in the whole or any part of the then current or outstanding marine business.

The National Company was ordered to be wound up by the Court on July 25, 1922, and the Official Receiver became its liquidator.

No insurance policies were ever issued to the appellant company by the National Company in respect of risks accepted by the latter under the terms of the agreement, and the Official Receiver refused to accept liability for losses on risks falling within the terms of the agreement, on the ground that there was no stamped policy ever issued and that the contract

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was therefore void under the provisions of the Stamp Act, 1891, and of the Marine Insurance Act, 1906.

It was conceded by the appellant company that if the participation agreement of January 27, 1922, was a contract for sea insurance within the meaning of the Stamp Act, 1891, or a contract of marine insurance within the meaning of s. 1 of the Marine Insurance Act, 1906, they must fail in their present claim; but it was argued on their behalf that, upon its true construction, the agreement was not a contract for sea or marine insurance but was a partnership agreement under which the National Company became the insurer jointly with the appellant company of all persons who took out marine insurance policies with the appellant company.

My Lords, in my opinion, this contention fails. I regard the participation agreement as an ordinary re-insurance agreement under which the National Company agreed to indemnify the appellant company against the risks assumed by the latter on the marine policies issued during the currency of the agreement. If the appellant company's contention is correct, it follows that privity of contract was created between the insured and the National Company in respect of policies issued by the appellant company during the period covered by the participation agreement. It is to be observed that the agreement dated back for over two years, so that many of the risks in which the National Company participated had actually expired before the agreement was entered into; and it is further to be observed that under art. IX. of the agreement the appellant company had the right in certain events to cancel the participation of the National Company in the then outstanding marine business. My Lords, it seems to me very improbable that an agreement couched in such language could have been intended by the parties to create any contractual liability between the persons insured by the appellant company and the National Company. It is common ground that no intimation was ever given to persons taking policies from the appellant company that the National Company had any interest therein, and in none of the policies issued by the appellant company was there any reference

to the National Company as an insurer. I think the true effect of the participation agreement is correctly stated in the judgment of Sargant L.J. in the Court of Appeal. In my view the meaning of the document is that the appellant company were to carry on its business as principals and that the National Company were, as between themselves and the appellant company, to receive a proportion of the premiums paid to the appellant company, less commission, and were, in consideration of such receipt, to indemnify the appellant company against a proportion of the losses suffered by the appellant company as principals. The agreement seems to me to have all the elements of re-insurance and to contain the stipulations which are normally to be found in a contract of re-insurance.

It follows that in my judgment the decision of the Courts below was correct and that the absence of a duly stamped policy is fatal to the appellants' claim. I move your Lordships accordingly.

VISCOUNT SUMNER. My Lords, I agree that the appeal must fail. The whole question turns upon the construction of a singular document, and, unless it can be shown that this document is not a treaty of re-insurance, the appellants, as has been conceded from the first, are in the wrong.

The pivot of the argument is the word "participation" and the word "participator"—words which are sprinkled with a liberal hand all over the agreement—but it is obvious that the word itself is neutral and indefinite, and until it is settled in what the parties are to participate and how, I do not think that any definite conclusion can be arrived at to affect the present issue.

It is quite true that nowhere throughout the agreement is it said that the National Company is to re-insure the English Company, although the words "re-insurance" and "re-assured" are used in other connections; nor is it ever said that this is a contract of indemnity by which the participator indemnifies the participatee, but in every other respect the features of a re-insurance treaty appear upon the face of the

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document. By art. I. the participator is "entitled to and shall accept a quota participation equal to a one-eighth share of all and every risk." Now there is no occasion to bind the participator to accept a share in all and every risk, unless the agreement means that, as and when an original risk is taken by the English Company, the National Company is entitled and bound to stand behind it and to accept a part of that risk. Then there is in art. II. a singular arrangement for relation back which, as the noble and learned Lord on the Woolsack has pointed out, is quite inconsistent with any partnership arrangement existing as from the year 1920. Further in the latter part of art. II. the words "any special re-insurance" are apparently used in contradistinction to the arrangement with this participator, which I should therefore assume to be a general re-insurance; all the more so because the participator has a maximum limit to his participation in respect of any one ship, which is a different thing from participating to the extent of a risk originally taken and appropriate only to the participator's taking a re-insurance line of his own with a limit of 1875*l.* on any one ship re-insured. Then twice in art. V. reference is made to the amount "ceded" and the risks "ceded" under this agreement —words which have their place in a re-insurance treaty and not, as it seems to me, in a partnership or a joint adventure agreement. In art. VI. the company retains the right to settle all claims under its policies, which of course are really its policies if this is a re-insurance, but would be the common policies of the two companies, if they have entered into some kind of joint account transaction. In art. IX. there is again a reference to "current or unexpired risks accepted hereunder until the expiry thereof," which seems to show a different basis for winding up the accounts from that which would arise under any kind of partnership transaction. Finally, under art. X. there is a provision that "the participator is absolutely bound in every case to follow the fortunes of the Company," which is re-insurance practice pure and simple, expressed in rather artless words, and is quite unnecessary if it relates to some obligation between partners,

as to which of course this would be implied, and another that it says: "It shall not prejudice the Company if it should accidentally happen that it has incorrectly advised or omitted to advise the participator of any particulars relating to this agreement," which I think is a clause wide enough to include, among other things, the obligation of the English Company, as the re-assured, to make disclosure to the re-insuring company of matters material to the risk and known to it. Under this clause it is excused from failure to make that disclosure before the insurance is effected, but I do not see that there would be any appropriateness in the words in connection with a partnership.

My Lords, on the other hand it is contended that this agreement effects some sort of common relation between the parties, the only really definite thing about which is that it is not re-insurance, and one is left to take one's choice of any relationship that the words can describe short of re-insurance. Though it is not an impossible thing, it is a novel idea to me that two insurance companies should become partners in a regular partnership. The Lord Chancellor has pointed out the singular results that would happen if both were engaged in writing the original risks as partners, the National Company being an undisclosed partner liable at the option of the assured to pay the whole of the loss, and having to get back its share of the loss from the English Company as best it may, supposing the English Company were to fall on the same evil days as the National Company has fallen upon.

I do not personally think that the provisions that I have referred to would have any place in any kind of partnership agreement. They would most of them be implied, and I certainly cannot construe the contract as a partnership or joint adventure agreement merely because it uses the word "participation." It was skilfully argued that, if it was not a partnership and was not a joint adventure, it was at least an agreement to share the risks as between the two parties. Now if it is an agreement to share the risks, it still appears to me it must operate by way of re-insurance. Nothing else would

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explain the provisions of the contract. There might be an agreement to share the results over a given period, an agreement that profits and losses should be ascertained, and, if the account was one way the participator should pay, and if it were the other way he should receive, but why put in any provision for following settlements or receiving a share in salvages? In that view it is the result of the account that the participation is to apply to.

My Lords, I have therefore come to the conclusion as a matter of construction that the decisions in the Courts below were right. I only wish to add that, had it been otherwise, I think there might have been some difficulty in seeing how the establishment of a partnership arrangement would have saved the parties from the application of the Stamp Act. I express no opinion upon the subject, except that I wish to say that if it were necessary to draw from the case of *Brett* v. *Beckwith* (1) the proposition that Mr. Porter extracted from that not very clearly reported case, I should wish to hear the case argued very fully before I could come to the conclusion that Lord Romilly either purported to hold or could justifiably have held, that, if there was a partnership, the Act of George III. could be given the go-by.

LORD ATKIN. My Lords, I agree that this appeal fails.

The question that has been propounded to us is whether the agreement in this case amounts to a re-insurance. If it does amount to a re-insurance it is admitted that the appellants must fail. The test of whether it is a re-insurance or not has been in my view quite correctly stated to be the question whether or not the re-insurers or the alleged re-insurers have assumed a contractual liability to the original assured, for such an original contractual liability is not an incident of re-insurance, and if such an original liability had been assumed then there would have been a contract of insurance upon which a stamp had already been paid on the policy issued by the English Company, who it is said for this purpose were the partners, or the agents, apart from a partnership, of the National Company.

(1) (1856) 26 L. J. (Ch.) 130.

Now, my Lords, accepting that test, it seems to me quite plain that the parties here by their agreement did not intend the National Company to assume any liability towards the original assured. The liability is a liability which is limited in the original agreement to one-eighth of the risk in consideration of a receipt of one-eighth of the premiums—it was varied afterwards by making it two-ninths. There are provisions by which the agreement is to relate back to insurances which were made within two years before the agreement in question, and there are provisions by which the interest, such as it is, of the National Company may be limited by the action of the English Company either in re-insuring or in granting similar participations to other companies. If in fact it was a partnership or an agency, then the National Company became bound in the full sum to the original assured, for there would be no limit known to him and he could have asserted as against the partner of the English Company the full liability. I cannot help thinking that the last legal result that the National Company ever contemplated was that they would or might have to assume the full and complete liability on the risks to the original assured, with no prospect of ever receiving, or no right in any case to receive, more than the particular share of the premium which the agreement gave them.

My Lords, for the reasons that have been given by the noble Lord on the Woolsack and by the noble Viscount, I am satisfied that this was in fact a policy of re-insurance. No liability was intended to be assumed by the National Company to the assured, and that being so the effect of the agreement is that for a definite portion of the premiums which the English Company received the National Company undertook to indemnify the English Company against the specific proportion of the risk to be ascertained in accordance with the agreement. The result is, it appears to me, that on the contention put before us this appeal must fail.

I should like to add one other word, for I feel that this result is unfortunate in some respects from the business point of view. After all, re-insurance of marine risks is a perfectly

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legitimate business, and the result, as appears from the discussion before your Lordships, is that it is impossible to conduct this form of business, by which a company that engages in marine insurance tries to secure in advance that its risks shall be fairly distributed by re-insurance policies, by any contract which can be enforced in Courts of law. As I say, I think that is a matter which might reasonably be considered. If it is the deliberate policy of the Exchequer that such business as this should go untaxed, then it seems to me that it would be right that the fiscal legislation should make that clear, so that parties might embark on business of this kind. On the other hand, if it is desirable, as it well may be desirable, that the Exchequer should take its share by taxing this business, which goes on, as we all know, to a considerable extent, then it seems to me that it would be right that provision should be made by which the present rules relating to the taxing of marine re-insurance should be altered, so that it would be possible for persons who desire to engage in business of this kind—as I say, in my opinion legitimate business—to be entitled to come to the Courts if necessary to enforce their rights. At present they are outlaws moving outside the pale, and it is difficult to see why that should be the position. But that has no effect upon the legal relations of the present parties, and on the matter which has been put before us I agree that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 27, 1928.

Solicitors for the appellants: *Parker, Garrett & Co.*
Solicitors for the respondent: *William A. Crump & Son.*

[PRIVY COUNCIL.]

INCHE NORIAH . . . . . APPELLANT; J. C.* 1928 Oct. 15.

AND

SHAIK ALLIE BIN OMAR . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Gift—Undue Influence—Fiduciary Relations—Independent Legal Advice.

Where the relations between a donor and donee raise a presumption that the donee had influence over the donor, the Court will set aside the gift unless (as laid down in *Allcard* v. *Skinner* (1887) 36 Ch. D. 145, 171) the donee establishes that it was the spontaneous act of the donor acting in circumstances which enabled him to exercise an independent will, and which justified the Court in holding that it was the result of a free exercise of the donor's will. If the evidence establishes the fact above stated it should not be disregarded merely because the donor did not receive independent legal advice. On the other hand the receipt of independent legal advice may rebut the presumption although it is not acted upon. But to have that effect it must be given with a knowledge of all the relevant circumstances, and be such as a competent and honest adviser would give if acting solely in the interest of the donor.

A Malay woman, who was of great age and wholly illiterate, executed a deed of gift of landed property in Singapore in favour of her nephew, who had the management of all her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. He was unaware, however, that the gift constituted practically the whole of the donor's property, and did not bring home to her mind that she could more prudently, and equally effectively, benefit the donee by bestowing the property upon him by will:—

Held, that the gift should be set aside, as the presumption which arose was not rebutted.

Powell v. *Powell* [1900] 1 Ch. 243; *Morley* v. *Loughnan* [1893] 1 Ch. 736; and *In re Coomber* [1911] 1 Ch. 723 discussed.

Judgment of the Supreme Court of the Straits Settlements reversed.

APPEAL (No. 64 of 1927) from a judgment of the Supreme Court of the Straits Settlements, Singapore (August 6, 1926), reversing a judgment of Deane J.

On April 18, 1922, the appellant, a Malay woman, who was a widow of great age and wholly illiterate, executed a deed of gift of landed property in Singapore of considerable value in favour

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, and LORD ATKIN.

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of the respondent, her nephew by marriage, who for some time had wholly managed her business and domestic affairs. Before executing the deed, which related to the whole of her property except property producing 30*l.* a year, the appellant had independent advice from a Singapore lawyer.

The circumstances are fully stated in the judgment of the Judicial Committee.

On July 17, 1925, the appellant brought an action against the respondent in the Supreme Court of Singapore, claiming to set aside the deed and for consequential relief.

The trial judge (Deane J.) set aside the deed and made an order as prayed. On appeal the Court (Murison C.J. and Brown J.; Reay J. dissenting) reversed the decision and dismissed the action. The majority of the Court held that at the time of the gift no such relations existed between the parties as raised a presumption of undue influence, but that if that presumption arose it had been rebutted by the evidence.

1928. June 15, 18. *Jenkins K.C.* and *Macaskie* for the appellant.

W. A. Greene K.C. and *Greenland* for the respondent.

In addition to cases referred to in the judgment here reported, reference was made in argument to: *Dent* v. *Bennett* (1); *Cooke* v. *Lamotte* (2); *Turnbull & Co.* v. *Duval* (3); *Blake* v. *Bayne* (4); and *Willis* v. *Barron.* (5)

Oct. 15. The judgment of their Lordships was delivered by

LORD HAILSHAM L.C. In this case the appellant brings an action against the respondent claiming that a deed of gift, dated April 18, 1922, and made between the appellant and respondent, should be set aside on the ground that the relationship between the parties at the time when the deed was executed was such as to raise a presumption of undue influence against the respondent, and that that presumption

(1) (1839) 4 My. & Cr. 269.
(2) (1851) 15 Beav. 234.
(3) [1902] A. C. 429.
(4) [1908] A. C. 371.
(5) [1900] 2 Ch. 121; [1902] A. C. 271.

had not been rebutted. The respondent denies that the relationship between the parties was such as to raise any presumption, and alleges that if there were such a relationship, the presumption was rebutted. The trial judge decided in favour of the appellant; but his judgment was reversed by the Court of Appeal, which held, by a majority, that there was no such relationship as raised any presumption of undue influence, and that if there were such presumption, it had been rebutted by the facts proved by the respondent. The facts leading up to the present action are as follows :—

The appellant is a Malay woman, wholly illiterate and of great age. The respondent is of Arab birth, and is the nephew by marriage of the appellant. The appellant's husband died before the year 1902, leaving her a considerable amount of landed property. This property consisted of (*a*) Two pieces of leasehold land of an area of some 4097 square feet, situate at Minto Road, in Singapore, and held by him at a rental of $2 per annum for a term of ninety-nine years from October, 1858. (*b*) A house known as 104 Southbridge Road, Singapore, held for a term of 999 years at a rent of $1 per annum. (*c*) Certain leasehold premises known as 1, 2 and 3 Minto Road, together with a small piece of land in McPherson Road, Singapore.

Shortly after her husband died, the appellant conveyed the whole of this estate to her daughter, Seetee Mariam, who was herself a widow and the sole surviving child of the appellant; and the appellant and her daughter then lived together at No. 2 Minto Road. The respondent came to Singapore about the year 1905, being then some twenty-three years of age. He went to live with his aunt, the appellant, and his cousin, Seetee Mariam, at No. 2 Minto Road. The respondent married in 1908, and brought his wife to live with him at this house. The respondent was entirely without means when he reached Singapore, and the appellant started him in business. At a subsequent date the respondent divorced his wife and remarried, and then went to live at No. 3 Minto Road, which he rented from Seetee Mariam at $10 a month. The two houses, Nos. 2 and 3

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Minto Road, adjoined one another and there was a through communication between the two, and the respondent saw the appellant daily.

From 1918 onwards the respondent collected the rents of her properties for Seetee Mariam. On August 25, 1921, Seetee Mariam died, and the appellant became entitled to the properties as her next of kin. On September 12, 1921, the appellant executed a deed appointing the respondent her attorney for the purpose of obtaining letters of administration of the estate of Seetee Mariam, to be granted to him for her benefit; on September 23, 1921, letters of administration were granted to the respondent accordingly. On March 1, 1922, the respondent conveyed to the appellant the whole of the properties as the legal personal representative of Seetee Mariam, but he continued to collect the rents. The respondent had employed Messrs. Drew & Napier, a well known firm of solicitors in Singapore, to act for him in regard to the grant of letters of administration. On April 18, 1922, the appellant executed a deed of gift whereby she gave to the respondent absolutely the whole of the properties referred to under (*a*) and (*b*) above, and left herself with a total gross income of about $30 a year. The properties comprised in the deed of gift had been sworn by the respondent for probate at $23,600, and No. 104 Southbridge Road was then let at a rental of $100 a month, and was assessed for rates at $250 a month.

At the time when the deed was executed, and ever since the death of her daughter, the appellant had lived alone at No. 2 Minto Road, with the respondent in the communicating house next door. The appellant was so old and infirm that she was unable ever to leave the house, and she seldom saw any of her relatives or friends; the respondent managed the whole of her affairs, including all her domestic affairs, and bought her food and clothing.

The respondent called evidence to show that before executing the deed, the appellant had independent advice from Mr. James Aitken, a lawyer of Singapore. Mr. Aitken gave evidence, and deposed that early in April, 1922, the

respondent sent for him and told him that the appellant desired him to prepare a deed of gift in his, the respondent's, favour; that he accordingly attended at No. 2 Minto Road, and received instructions from the appellant to prepare such a deed of gift; he thinks that the details as to the leases of the land were given by the respondent. After receiving these instructions he saw the respondent at his office on a number of occasions, and he stated that on one occasion he told the respondent that he had better get another solicitor to represent him in order to protect his interests. After preparing the deed of gift, he took it to the appellant's house and explained it to her; the respondent was there when he arrived, but was not present during the explanation. He read the deed to the appellant and told her that it was irrevocable, and that it gave the property absolutely to the respondent, and he asked her if she signed voluntarily. He did not know that she was parting with practically the whole of her property, and he asked no questions as to the value of her total estate; he thought when he saw her that she was about eighty years of age and that she would not live long; he did not advise her that if she desired to ensure the respondent having her property after her death it would be possible to do so by will. His fees for drawing the deed of gift were paid by the respondent out of rents collected by him on behalf of the appellant. In addition to this evidence, a Mr. Campbell, another lawyer of Singapore, was called by the respondent, and stated that on the instructions of one of the appellant's relatives who had heard of the deed of gift, he went to see the appellant at her house on May 20, 1922; that the appellant was very angry at his coming, and said that she had made the deed voluntarily and that the respondent maintained her and took care of her, and that she did not wish the transaction set aside. The interview lasted about ten minutes; the respondent was not present when he arrived, but as Mr. Campbell was explaining to the appellant why he had come, the respondent came in and asked what was happening, and the witness thereupon explained how he came to be there, and left the house.

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The appellant's evidence at the trial was disregarded, because it was recognized by both sides that her mind was then in such a state as to render her evidence quite valueless. The respondent gave evidence, but the learned trial judge did not believe his testimony. The learned trial judge found that from the death of her daughter onwards the appellant was a feeble old woman, unable to leave the house, relying entirely upon the respondent for everything—even for her food and clothes—leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the respondent's hands. He held that when the deed was executed by the appellant her relationship with the respondent was such that he had gained complete ascendancy over her, and that the presumption arose that the deed was procured by his undue influence. He held further that the appellant had had no independent legal advice, and that the circumstances were not such as to rebut the presumption. At the hearing before this Board the respondent contended that there was no confidential relationship between the parties giving rise to any presumption; that if there was any such relationship, the gift was not referable to the relationship; and that in any event the evidence called by the respondent was sufficient to rebut the presumption, if it ever arose.

The principles upon which this case falls to be decided have been the subject of a series of decisions in the English Court of Chancery; and it was not disputed between the parties that the principles of English law must be applied. The question to be decided is stated in the judgment of Cotton L.J. in the well known case of *Allcard* v. *Skinner* (1), as follows: "The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes:

(1) 36 Ch. D. 145, 171.

first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify (1) the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In their Lordships' view the relations between the appellant and respondent are correctly summarized in the judgment of the trial judge, and they are amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will, and which justified the Court in holding that the gift was the result of the free exercise of her will.

At the hearing before this Board there was much discussion upon the question whether the presumption can be rebutted in any other way than by proof of independent legal advice, and also as to what constituted sufficient independent legal advice for this purpose. A number of cases were cited containing expressions of opinion by various learned judges, some of which are not easy to reconcile unless they are treated as governed by the particular facts of the case then under discussion. Their Lordships are satisfied that in the present

(1) The printed report reads "justifies" by a manifest error.

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case there were no circumstances except the giving of independent legal advice, if that was given, to rebut the presumption; but since the cases have never been reviewed in any ultimate Court of Appeal, their Lordships think it right to state the conclusion which they have reached.

For the appellant reliance was placed on the case of *Rhodes* v. *Bate* (1), and the passage in the judgment of Turner L.J.: "I take it to be a well-established principle of this Court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." Also upon the language used by Farwell J. in *Powell* v. *Powell* (2): "It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation"; and on the further statement of the learned judge: "Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need of protection. The real meaning of the rule is that the youth, being in the eye of the Court unfit to deal irrevocably with his parent or guardian in the matter of a gift of this kind, must appoint some independent adviser to act for him. It is the action resulting from the advice, not action against the advice, that binds the donor."

(1) (1865) L. R. 1 Ch. 252, 257. (2) [1900] 1 Ch. 243, 245, 246.

On the other hand, the respondent relied on a number of statements of the law which indicate that independent advice is only one of the methods by which the presumption can be rebutted. As an instance, the judgment of Wright J. in *Morley* v. *Loughnan* (1), where the learned judge says: "The burthen lies on the recipient to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances"; also the judgment of the Court of Appeal in the case of *In re Coomber*. (2)

The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard* v. *Skinner*. (3) But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with

(1) [1893] 1 Ch. 736, 752. (2) [1911] 1 Ch. 723.
(3) 36 Ch. D. 145, 171.

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a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

In the present case their Lordships do not doubt that Mr. Aitken acted in good faith ; but he seems to have received a good deal of his information from the respondent ; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties ; and they regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made under circumstances which give rise to the presumption must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption.

It follows that in their Lordships' opinion the appeal must be allowed ; the judgment of the trial judge must be restored, and the respondent must pay the costs of the action in the Courts below and of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Tamplin, Tayler & Joseph.*
Solicitors for respondent : *Nisbet, Drew & Loughborough.*

[PRIVY COUNCIL.]

CANADIAN SPOOL COTTON COMPANY, LIMITED . . . . . } APPELLANTS ; J. C.* 1928 *Oct.* 16.

AND

CITY OF MONTREAL . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec) — Municipal Taxes — Exemption — Validity of Resolution of Town Council—Prospective Manufacturer—Cities and Towns Act, R. S. Queb., 1888, *Pt. IX., arts.* 4559, 4642.

A resolution passed by a town council governed by the Cities and Towns Act, R. S. Queb., 1888, Pt. IX., that a person shall for twenty years be exempt from payment of municipal taxes conditionally upon his establishing within the town a factory at a certain cost and employing thereat a specified number of hands, is valid under art. 4559 of the above Act. The power of a council under art. 4559 is not restricted to industries which are actually being carried on at the date of an exempting resolution, either by the language of the article or by reason of the power given by art. 4642 to any city, town, or village council to exempt future manufactories by by-law.

City of Montreal v. *Dupré* [1924] S. C. R. 246 disapproved.

Judgment of the Court of King's Bench reversed.

APPEAL (No. 60 of 1928) from a judgment of the Court of King's Bench for the Province of Quebec (February 24, 1928), affirming a judgment of the Recorder's Court, Montreal.

The respondent city sued the appellants in the Recorder's Court to recover municipal taxes for the years 1918, 1919 and 1920, alleged to be due upon land and buildings occupied by the appellants as a cotton mill within the limits of Maisonneuve ward of the city of Montreal. The appellants claimed that they were exempt from municipal taxes by virtue of a resolution passed by the council of the town of Maisonneuve on April 3, 1907, before the erection of the cotton mill. The town of Maisonneuve was annexed to the city of Montreal by an Act of 1918. The question

* *Present :* LORD HAILSHAM L.C., VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and CHIEF JUSTICE ANGLIN.

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arising in the appeal was whether the resolution was valid under art. 4559 of the R. S. Queb., 1888, having regard to the fact that though, at the date of the resolution, the appellants were proposing to erect the cotton mill they had not done so.

The terms of art. 4559, the circumstances in which the resolution was passed, and its material terms, appear from the judgment of the Judicial Committee.

The Court of King's Bench, affirming the judgment of the Recorder, held that the resolution was invalid, having regard to the decision of the Supreme Court of Canada (Duff and Maclean JJ. dissenting) in *City of Montreal* v. *Dupré*. (1) The present appeal was in effect an appeal from that decision.

1928. June 28, 29. *Geoffrion K.C.* for the appellants. *Lafleur K.C.* and *Parent* for the respondents.

Oct. 16. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, affirming a judgment of the Recorder of Montreal in an action brought in the Recorder's Court whereby the city of Montreal recovered a sum of $54,419.56, the arrears of municipal taxes for the years 1918, 1919, 1920, with interest. The appellants' contention was that the property was exempt from taxation by reason of a resolution of the council of the town of Maisonneuve on April 3, 1907, approving a contract with the appellants which granted the exemption claimed. The city of Montreal, the successors in title to the town of Maisonneuve in this respect, disputed the validity of the exemption. The Recorder and the Court of King's Bench, following the decision of the majority of the Supreme Court of Canada in the *City of Montreal* v. *Dupré* (1), held the exemption invalid. In effect this is an appeal from the decision of the Supreme Court.

At the time of the resolution and contract the appellant company were proposing to establish in the town of

(1) [1924] S. C. R. 246.

Maisonneuve a mill for spinning cotton thread and fine yarns. The exemption was granted on the terms that they should commence to erect the mill within four months, should spend on the building and plant at least $200,000, and should employ 200 hands, paying in wages upwards of $50,000 per annum. The mill was duly erected and the conditions continuously performed.

The validity of the exemption depends upon the provisions of art. 4559 of the R. S. Queb. of 1888, which governed the transaction at that time. The words of the article are: "The council may by a resolution exempt from the payment of municipal taxes for a period not exceeding 20 years any person who carries on any industry, trade or enterprise whatsoever, as well as the land used for such industry, trade or enterprise, or agree with such person for a fixed sum of money payable annually for any period not exceeding 20 years in commutation of all municipal taxes. It may also exempt the poor of the municipality and their property from the payment of municipal taxes. Such exemption or agreement shall not extend to work upon watercourses, boundary ditches, fences or front roads connected with taxable property so exempted or commuted."

The objection taken to the resolution and the contract is that at the time they came into existence the appellants were not "a person who carries on any industry, trade or enterprise," inasmuch as they were then only intending to establish their spinning mill.

If the section stood alone their Lordships would not have felt much difficulty in overruling the objection. It appears to them that the words "who carries on any industry" and the words "used for such industry" are phrases qualifying the words "person" and "land" respectively, as of the time at which they will be exempt from taxation which otherwise would fall upon them, and are intended to express the conditions under which the exemption will come into existence and continue to exist. If the words had been "may exempt any trader" as well as "his warehouse," such a narrow construction as that the validity of the exemption

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depended upon whether the trader had begun to trade the day before or the day after the promise to exempt him would hardly have been put forward. So far as the power of exemption was given for the purpose of encouraging trade within the municipality, it would seem more probable that the power should extend to prospective traders rather than be confined to those already there.

It is said, however, that if one considers another article in the revised statutes of 1888, No. 4642, one will find a statutory provision dealing with exemptions of future manufactories, and one must therefore conclude either that the words in art. 4559, wide enough in their ordinary meaning to entitle a municipality to agree to exempt from taxation a person proposing in the future to carry on any industry, trade, etc., must be cut down so as to confine the power to a person at the time of the resolution in fact carrying on an industry, trade, etc., or at any rate must be so limited in the case of persons proposing to establish a manufactory, to which class of persons alone the provisions of art. 4642 apply. The power given by art. 4642 is given to any city, town or village municipality. It is, as has been said, limited to persons proposing to establish a manufactory not being a flour mill, gasworks or distillery. The exemption may only be for ten years: a statutory notice with statutory particulars as to the nature of the factory must be given, and the council must proceed by by-law, which must be brought before the council at two different meetings. There is no power given to agree in advance to commute annual payments for a fixed sum such as is given by art. 4559.

Considering the different scope of arts. 4642–3, the fact that the powers are given to other authorities additional to those affected by art. 4559, that the exemption is dealing only with manufacturers and not as in art. 4559 with persons exercising any industry, trade or enterprise, and that it does not deal with the power to commute, their Lordships can find nothing in the articles in question so repugnant to the meaning which the words of art. 4559 would otherwise ordinarily bear as to justify them in coming to the conclusion that reading

the revised statutes as a whole the words of art. 4559 should receive a limited construction. Their Lordships think that the effect of the two sections is that so far as manufactories were concerned there were overlapping powers, a result, as Duff J. has observed, neither startling nor uncommon.

This view appears to their Lordships to be supported by a consideration of the previous legislation which was reviewed with great care by the learned judges in the Supreme Court. Taking the view that their Lordships do of the construction of the relevant articles considered only as forming part of the revised statutes, it becomes unnecessary to deal at any length with that part of the case. Their Lordships consider it enough to say that they agree with the survey of the previous legislation made by Duff J. in the case of the *City of Montreal* v. *Dupré* (1), and with the conclusions which he draws therefrom.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the judgments of the Courts below set aside and the action dismissed with costs here and below.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

(1) [1924] S. C. R. 246.

[PRIVY COUNCIL.]

J. C.* 1928 Oct. 15.

ADAMSON AND OTHERS . . . . . APPELLANTS;

AND

MELBOURNE AND METROPOLITAN BOARD OF WORKS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Australia (Victoria)—"*Charitable Institution*"—*Construction of Act*—*Supply of Water free of Charge*—*Melbourne and Metropolitan Board of Works Act*, 1915 (6 *Geo.* 5, *Vict.*; *No.* 2696), *s.* 94.

The words "charitable institution" in any legislative Act should be given their technical legal sense, unless a contrary intention appears from the context.

The language, however, of s. 94 of the Melbourne and Metropolitan Board of Works Act, 1915, shows that the obligation thereunder to provide water free of charge to "any public hospital or charitable institutions" was intended to apply only in the case of municipally owned or conducted institutions. Consequently, a home for lost dogs, which is not an institution of that character, is not entitled under the section to a free supply of water, although it is a charitable institution in the legal sense.

Chesterman v. *Federal Commissioner of Taxation* [1926] A. C. 128 followed.

Swinburne v. *Federal Commissioner of Taxation* (1920) 27 C. L. R. 377 disapproved.

Judgment of the Supreme Court of Victoria [1926] V. L. R. 371 affirmed on a different ground.

APPEAL (No. 138 of 1927) by special leave from a judgment of the Supreme Court of Victoria (August 3, 1926) reversing a judgment of the county court at Melbourne.

The respondent Board brought an action in the Melbourne County Court to recover from the appellants, the trustees of a Melbourne institution called the Lost Dogs' Home, charges for water supplied thereto. The appellants claimed that under s. 94 of the Melbourne and Metropolitan Board of Works Act, 1915, the Home was entitled to a supply of water free of charge.

* *Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKIN, and CHIEF JUSTICE ANGLIN.

The Home was established by private persons. Its objects, according to its rules, were: (*a*) to restore lost dogs to their owners; (*b*) to give temporary shelter and food to lost, abandoned, or starving dogs; (*c*) to endeavour by sales to find good homes for suitable dogs; (*d*) to secure a merciful and painless death for those dogs which owing to old age, injury, disease or other sufficient reason the Committee may deem it advisable to destroy, and the other objects therein set out. The funds of the institution were derived from bequests, donations, and subscriptions of members; it also received yearly 360*l.* from the Melbourne City Council for services in seizing stray dogs; it was empowered by the municipal councils to seize wandering dogs under local Dog Acts.

The terms of s. 94, relied on in defence to the action, appear from the judgment of the Judicial Committee.

The county court judge dismissed the action, holding that the Home was a "charitable institution" within the meaning of s. 94, and consequently entitled to a free supply of water.

An appeal to the Full Court of the Supreme Court of Victoria was allowed upon grounds which appear from the present judgment. The appeal is reported at [1926] V. L. R. 371.

1928. July 19, 20. *Gover K.C.* and *Sir H. Cassie Holden, Bart.*, for the appellants.

Stamp for the respondents.

The arguments were directed to the true construction of s. 94, reference being made to the cases and legislative Acts mentioned in the judgment of the Judicial Committee.

Oct. 15. The judgment of their Lordships was delivered by

CHIEF JUSTICE ANGLIN. The Melbourne and Metropolitan Board of Works (respondents) brought this action in the Melbourne County Court to recover a sum of 65*l.* 19*s.* claimed as a balance due for water supplied by it to the defendants (appellants), who, by their defence, asserted a right to exemption from water rates as a "charitable institution" within

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the meaning of s. 94 of the Melbourne and Metropolitan Board of Works Act, 1915.

That section reads as follows: "94. In all the pipes to which any fire plug is fixed the Board shall provide and keep constantly laid on for use without charge, unless prevented by unusual drought or other unavoidable accident or during necessary repairs, a sufficient supply of water for the following purposes (that is to say):—for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public hospital or charitable institutions or any public pumps baths and wash-houses that may be established for the use of the inhabitants and paid for out of any city town or borough rates; and such supply shall be provided in such quantities and upon such terms and conditions as may be agreed upon by the council of the city town or borough to which such water is supplied and the Board. Provided that no baths or wash-houses shall be entitled to be supplied with water under the provisions of this section unless the charges for the use thereof by the inhabitants shall be approved of and shall not exceed the amounts fixed by the Board."

In the county court this defence was upheld; but, on appeal, the Full Court of the Supreme Court of Victoria reversed that judgment and held the defendants liable. The sole issue is whether or not the Lost Dogs' Home, conducted by the defendants as trustees, is a "charitable institution" within s. 94.

This legislation, it was stated by counsel, was introduced in the Colony of Victoria in 1853 by the statute 16 Vict. c. 39, which referentially incorporated (amongst other sections) s. 37 of the Imperial statute known as the Waterworks Clauses Act, 1847. The section of the Imperial statute contains no reference to "charities." By the Municipal Institutions Act, 1863, s. 365, municipal councils were first empowered to appropriate public moneys "for erecting, establishing, maintaining or otherwise aiding any hospital or other institution or society . . . . for the relief of such poor persons as through age, sickness, infirmity or accident are unable to help themselves. . . . ."

In 1865, the statute of 1853 was repealed and an Act was passed (the Public Works Statute, 1865) to amend and consolidate the laws relating to public works. This statute contains, as s. 216, provisions in all material respects identical with the provisions of s. 94, above quoted, and, in particular and for the first time, included in the subjects of exemption "any public hospital or charitable institutions." Some other modifications, not now material to be considered, were made in adapting the Imperial statute to the local conditions of the Colony.

The learned county court judge took the view that, when introducing the words "any public hospital or charitable institutions" into s. 216, the Legislature had probably failed to notice "certain qualifying words contained in the rest of the section," and that, having regard to local conditions, if the words so introduced were to be given any substantial application they must be read as extending to hospitals and charitable institutions not maintained by, or subject to the control of, municipal authorities. Otherwise, he says: "the amendment must be regarded as almost useless and very insignificant . . . . because there is certainly not more than one hospital under the control of the municipality and, so far as counsel could inform me, not one single charitable institution, and this fine-sounding amendment would be a very feeble contribution in the aid of charity." He accordingly read the words "established for the use of the inhabitants, etc.," as inapplicable to "any public hospital and charitable institutions." He proceeded: "Apparently when the section was originally drafted the 'purposes' designated were all 'purposes' controlled by municipalities and when the amendment was made no attention was paid as to the method to be adopted for regulating the charges to be made for supplying hospitals or charitable institutions. But supposing an omission has been made for regulating the costs and charges, I do not think it would be right to hold that the obligation of supplying water to hospitals was thereby completely defeated."

In the Full Court the view prevailed that the construction

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of the statute contended for by the plaintiffs resulted from the decision of the High Court of Australia in *Swinburne* v. *Federal Commissioner of Taxation*. (1) The later decision of this Board in *Chesterman* v. *Federal Commissioner of Taxation* (2) was regarded as distinguishable from, and was treated as not having overruled, *Swinburne's* case, notwithstanding that in a later Australian case, *Young Men's Christian Association of Melbourne* v. *Federal Commissioner of Taxation* (3), members of the High Court had expressed the view that it might be necessary to reconsider the decision in *Swinburne's* case (1) in the light of the *Chesterman* judgment.

In *Swinburne's* case (4) the High Court indicated that in its opinion the meaning attributed in ordinary parlance in Australia to the words "public charitable institution," used in s. 18, sub-s. 1 (*h*) (iii.), of the Income Assessment Act, 1915, is: "an institution which—assuming its public character . . . . is charitable in the sense of affording relief to persons in necessitous or helpless circumstances, and in most instances, at all events, if required, gratuitously; that that is the popular understanding of the phrase is a matter of common knowledge, and so within our judicial cognisance." The judgment then proceeds to enumerate a number of instances in which by special interpretation clauses this popular meaning had been placed upon the word "charitable" as used in various statutes passed by the former colonial Legislatures of Australia, which, it says, confirm the view that that construction should prevail in regard to the section immediately under consideration. It concludes: "The Federal Act in adopting the same term 'public charitable institutions in Australia' cannot, therefore, be taken as intending any meaning other than the generally accepted meaning in Australia unless its own structure indicates another meaning. There is no context to indicate a secondary meaning, and, therefore, we are of opinion that the meaning of the phrase contended for by the Commissioner [i.e., the narrower popular meaning] is its true one."

(1) 27 C. L. R. 377.
(2) [1926] A. C. 128.
(3) (1926) 37 C. L. R. 531.
(4) 27 C. L. R. 377, 386.

In *Chesterman's* case (1), in delivering the judgment of this Board dealing with the meaning of the word "charitable" in s. 8, sub-s. 5, of the Australian Estate Duty Assessment Act, 1914–1916, after pointing out that the appellants contended that the word "charitable" bore its technical legal meaning, as in the statute of Elizabeth, the respondent on the contrary maintaining that it bore its popular meaning, which involves the idea of assisting poverty or destitution, Lord Wrenbury said (2): "In approaching this question the starting-point is found in *Pemsel's* case (3) in the House of Lords, and in Lord Macnaghten's words: 'In construing Acts of Parliament it is a general rule . . . . that words must be taken in their legal sense unless the contrary intention appears.'" Lord Wrenbury then proceeds to consider whether from the context an inference can properly be drawn that the word "charitable" is used in the Estate Duty Act in its popular and not in its technical legal meaning and, failing to find in the context any sufficient ground for giving to it the former rather than the latter meaning, the conclusion is reached that the technical legal meaning must prevail.

From this statement of the effect of the two judgments it is obvious that, although *Swinburne's* case (4) is not expressly adverted to in the report of the *Chesterman* case (1), it must be regarded as having been overruled by that decision. Indeed the principle of construction upon which the *Swinburne* case (4) rests is directly opposed to that which forms the foundation of the judgment of this Board in *Chesterman's* case. (1) Moreover, their Lordships would observe that it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same Legislature. A fortiori must it be so when resort is had, as in the *Swinburne* case (4), for this purpose to the enactments of other Legislatures.

(1) [1926] A. C. 128.
(2) [1926] A. C. 128, 131.
(3) [1891] A. C. 531, 580.
(4) 27 C. L. R. 377.

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The Lost Dogs' Home is admittedly a charitable institution in the technical legal sense: *In re Douglas* (1); and it follows that the conclusion reached in the Supreme Court of Victoria cannot be maintained upon the ground there assigned.

Approaching the construction of the Act now before them with the view that the words "charitable institutions" must be taken in their technical legal sense "unless a contrary intention appears," their Lordships now proceed to consider whether in the present instance the context excludes that meaning and requires that these words should be given a more restricted scope.

Envisaging s. 94 as a whole, its design would appear to be to provide for the furnishing of a sufficient supply of water, free of charge, for certain municipal purposes and to certain public institutions supported by, or at the cost of, the municipal authorities for the use of the inhabitants. The cleansing of sewers and drains and the cleansing and watering of streets (the first purposes specified) are undoubtedly works carried on by those authorities. The adjective "public" preceding the word "hospitals" would seem also to qualify the immediately succeeding words "charitable institutions" (these being the second set of objects specified), just as the adjective "public" preceding the word "pumps" also qualifies "baths and wash-houses" (these three forming the last group of subjects of exemption). While it may be questionable whether the clause "that may be established for the use of the inhabitants and paid for out of any city town or borough rates," grammatically applies only to "public pumps baths and wash-houses" (the words which immediately precede it), or also extends to "public hospitals or charitable institutions," the repetition of the word "public" before "pumps, etc.," would seem to emphasize the municipal character of the undertakings to be benefited by the exemption. But whether the qualifying clause "that may be established, etc.," does or does not apply to all the preceding subjects of exemption, the application of the immediately succeeding clause "and *such* supply shall be provided,

(1) (1887) 35 Ch. D. 472.

etc.," to every item of the supply dealt with in the section admits of no doubt. The reference by the word "such," preceding the word "supply," to the "sufficient supply of water" mentioned in the first member of the section is clear. It is, therefore, certain that the entire supply of water dealt with in the section, and each item thereof, is required to be: "provided in such quantities and upon such terms and conditions as may be agreed upon by the council of the city town or borough to which such water is supplied and the Board." This latter provision would seem to put beyond doubt the municipal character of all the works and institutions intended to be benefited. The agreement as to quantities, terms and conditions is to be made *by* the council of the municipality *to* which such water is supplied.

Their Lordships are unable to assent to the view of the learned county court judge that it may be assumed that the Legislature, when introducing, in 1865, into s. 216 of the Public Works Act, the words "any public hospitals or charitable institutions," had overlooked the qualifying words contained in that section, which restrict its application to municipal undertakings. There is nothing to warrant such an assumption. On the contrary, the Legislature must, in their Lordships' opinion, be taken not only to have been cognizant of the general character and scope of the section, but also to have been fully apprised of the presence in it, and of the significance, of the restrictive clauses now under discussion. That it was so is indicated by the verbal changes made in their phraseology.

In the opinion of their Lordships, therefore, the section as it stands discloses an intention on the part of the Legislature to restrict the exemption for which it provides to public institutions—i.e., municipally owned or conducted institutions, to which class, admittedly, the Lost Dogs' Home does not belong.

So far as the history of the section may be looked at, it serves to confirm this view. The corresponding provision of the English Waterworks Clauses Act, 1847, made part of the law of Victoria in 1853, was confined in its application to

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public works and institutions established "for the free use of the inhabitants" or paid for out of municipal rates. The provision did not then extend to public hospitals or charitable institutions, municipal authorities not having had, at that time, the right to establish, maintain or aid such institutions. That power was conferred by the legislation of 1863, already adverted to, and shortly afterwards (1865)—not improbably with a view to further benefiting such hospitals or charitable institutions as any municipality to which the Melbourne and Metropolitan Waterworks Act, 1915, applies, might see fit to establish, maintain or aid under the legislation of 1863—the words "any public hospitals or charitable institutions" were inserted in re-enacting the section which already provided for the exemption from water rates of certain other municipal undertakings.

Their Lordships are, accordingly, of the opinion that for the reasons they have indicated the conclusion reached by the Supreme Court of Victoria was correct. They will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Brundrett, Randall & Co.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[HOUSE OF LORDS.]

MESSAGER . . . . . APPELLANT;

AND

BRITISH BROADCASTING COMPANY, LIMITED . . . . . } RESPONDENTS.

H. L. (E.)*
1928
Nov. 8.

Copyright — Infringement — Opera — Broadcasting — Performing Rights Agreement — Construction — Licence or Assignment.

The appellant was the composer of the music of a French opera, an English version of which was produced at a London theatre on the terms of an agreement of March 23, 1905. By this agreement, made between the composer (the appellant) and the authors of the opera (thereinafter called "the licensors") of the one part and the proprietor of the theatre (thereinafter called "the licensee") of the other part, after reciting that the licensors had delivered the play to the licensee, with the score of the music, with a view to its production in London and elsewhere "on the terms hereinafter mentioned," the licensors granted the licensee the sole and exclusive right of representing the play in the United Kingdom, America, and the British Colonies and Dominions. The agreement further provided that the copyright in the music of the play should remain the property of the appellant; that on the failure of the licensee to produce the play in London within a certain time all rights of representation as aforesaid should revert to and become again the absolute property of the licensors; that the licensee should pay to the licensors as royalties certain percentages of the gross profits; that the licensee should keep proper books showing the gross receipts of the theatres at which the play should be represented, and that the licensors should be entitled to inspect the books, so as to enable them to verify the amount of the percentage payable to them.

The respondents, in pursuance of a permission granted to them by a theatrical company, to whom on the death of the licensee the benefit of the agreement had been assigned by his executors, gave a broadcast performance of the opera at their studio in London.

In an action by the appellant against the respondents for infringement of copyright:—

Held, upon the construction of the agreement, that it operated as an absolute assignment of the performing rights of the opera within the prescribed area and was not a mere licence, and that it was not limited to representations on the stage of a theatre; and that the action failed.

Decision of the Court of Appeal [1928] 1 K. B. 660 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of McCardie J. (2)

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, LORD BUCKMASTER, LORD CARSON, and LORD WARRINGTON OF CLYFFE.

(1) [1928] 1 K. B. 660. (2) [1927] 2 K. B. 543.

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The appellant was the composer of the music of a French opera "Les Petites Michus," an English version of which was produced at Daly's Theatre by the late George Edwardes on the terms of an agreement dated March 23, 1905, and made between the composer and authors of the opera of the one part and George Edwardes of the other part. The respondents in pursuance of a permission granted to them by a company called George Edwardes (Daly's Theatre), Ld., who had obtained an assignment of the benefit of the agreement from George Edwardes' executors, gave a broadcast performance of the opera at their studio in Savoy Place.

Thereupon the appellant brought an action against the respondents for an injunction to restrain the respondents from transmitting by wireless telephony or otherwise performing in public the music of the opera without the consent of the appellant, and for damages for infringement of copyright.

The question turned upon the construction of the agreement, the terms of which are fully set out in the report of the case before the Court of Appeal and are summarized in the headnote.

McCardie J. held that the agreement conferred a limited licence on George Edwardes and was confined to theatrical representations of the ordinary character at theatres and no other places, and that it ended with the death of George Edwardes in 1915; and he gave judgment for the appellant for 150*l.* damages.

The Court of Appeal (Scrutton L.J., Atkin L.J., and Eve J.) held that the agreement was not a mere licence personal to George Edwardes, but was an assignment of the performing rights of the opera within the prescribed area, and that the benefit of the agreement was assignable by George Edwardes' executors; and further, that the right of representation conferred by the agreement was not limited to performances in theatres. They accordingly reversed the judgment of McCardie J. and ordered judgment to be entered for the respondents.

The arguments in support of the appeal sufficiently appear from the judgment of the Lord Chancellor. The respondents' counsel were not called on.

Sir Herbert Cunliffe K.C. and the *Hon. S. O. Henn Collins* for the appellant.

Sir Duncan Kerly K.C. and *Trevor Watson* for the respondents.

1928. Nov. 8. LORD HAILSHAM L.C. My Lords, this is an appeal from a decision of the Court of Appeal reversing a judgment given by McCardie J. in favour of the appellant, to whom the learned judge awarded 150*l.* damages for breach of copyright.

My Lords, in the view that I take of the case it turns within a very narrow compass, and it is only necessary to state quite shortly one or two dates and facts in order to indicate the point which arises. It appears that the appellant, M. Messager, was the composer of a play known as "Les Petites Michus"; by an agreement of March 23, 1905, arrangements were made between M. Messager, the composer, and M. Vanloo and M. Duval, the authors of the play, and Mr. George Edwardes, of Daly's Theatre in London, whereby Mr. George Edwardes had certain rights conferred upon him with regard to the production of the play in the British Dominions and in the United States of America. I will revert to the exact terms of that agreement in a few moments. In the year 1915 Mr. George Edwardes died, and on May 6, 1920, his executors assigned to a company known as George Edwardes (Daly's Theatre), Ld., as far as they lawfully could, all the rights passing to them under the agreement of 1905. On October 19, 1926, George Edwardes (Daly's Theatre), Ld., licensed the respondents, in consideration of a sum of 60*l.*, to perform the play at their broadcasting studio and thereby to allow all their subscribers and all those who used their wireless receivers to hear the performance. On November 10, 1926, that performance took place. Thereupon M. Messager complained that the respondents were acting without his licence and were

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therefore infringing his copyright, and, upon the respondents rejecting that position, this litigation ensued.

My Lords, from that recital of the facts I think it follows that the whole question turns upon the effect of the agreement of March 23, 1905. That document is made between M. Messager, M. Vanloo, and M. Duval, who are collectively described as "the licensors," of the one part, and Mr. George Edwardes, who is in the agreement called "the licensee," of the other part. It recites that "the licensors have delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned." Then by clause 1 the agreement provides: "The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom Great Britain and Ireland America and the British Colonies and Dominions." I think counsel for the appellant conceded that the language of that clause taken by itself would be wide enough to confer upon Mr. George Edwardes the absolute performing rights of the play within the area mentioned in the clause, but it was contended that that clause, when read with the recital, to which I have called attention, and with the subsequent clauses in the agreement, must be construed as merely operating either as a licence or, at the most, as the assignment of a right to perform in theatres, or else, as I think Mr. Henn Collins suggested, in towns. My Lords, I have looked at the subsequent clauses of the agreement, but I am quite unable to accept that view. Clause 2 provides that "The copyright in the music of the play shall remain the property of the said André Messager and he shall be at liberty to use the English lyrics for sale with the music." Clause 3 provides: "The play shall be adapted for the English stage at the expense of the licensee." Then by clause 4 it is provided—and this is the clause particularly relied on by the appellant—"The licensee shall in consideration of the rights hereby granted pay to the licensors the following royalties or fees: (*a*) Four per cent. of the gross receipts up to Eight hundred pounds per week

and six per cent. of the gross receipts over that amount for London and New York and half of these amounts for all other towns with the exception of No. 3 or fit-up towns the fees of which are to be one-fourth of London and New York such fees in the case of the United Kingdom Great Britain and Ireland to be paid weekly and in respect of America and the British Colonies and Dominions monthly." By clause 5 it is stipulated: "If the play be not produced in London by the said George Edwardes within three months from this date all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors." Clauses 6 and 7 are not relied on as material. Clause 8 stipulates that: "Proper books showing the gross receipts of the Theatre or Theatres at which the said play shall be represented shall be kept by the licensee and the licensors or their agent duly authorised in writing shall be entitled at all reasonable times to inspect the said books and all vouchers accounts and other documents relating to the said receipts so as to enable the licensors to verify the amount of percentage payable to them as aforesaid." Sir Herbert Cunliffe, for the appellant, contended that the recital showed that the play had been delivered "with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned," that those terms were shown by clause 4 to be a percentage of the gross receipts, and clause 8 showed that the gross receipts were limited to gross receipts at theatres within the named area. My Lords, I am unable to accept that construction of the agreement. In my view clause 8 is a stipulation that books, in case of representations at a theatre, shall be kept and be open for inspection, but it cannot be read as limiting the right of the licensors to receive 4 per cent. of the gross receipts within the meaning of clause 4. But even if I were wrong on this construction and if the payments to the licensors were limited to 4 per cent. of the gross receipts of the performances at theatres, I should still be unable to treat that expression as limiting or cutting down the plain grant which is contained in clause 1. That, in my view, plainly operates as an assignment to Mr. George

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Edwardes of the sole and exclusive right of representation within the area named in the clause, and I think that that view of the clause is strengthened, not only by the expression in clause 2, which stipulates that the copyright in the music shall remain the property of M. Messager, but also by the language of clause 5, which provides that in the event of non-production within three months "all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors." That seems to me inept language in which to describe the mere cessation of a licence, and is much more apt to describe the reversion to the licensors of rights which had been assigned by clause 1.

My Lords, if I am right upon that question of construction, then I think the other points raised by the appellant do not really arise. It was suggested that the licence or grant was one which was personal to Mr. George Edwardes and therefore not assignable by him; but if this be an assignment out and out to Mr. George Edwardes, I do not think it was contended that Mr. George Edwardes in turn could not assign those rights to whomsoever he chose. At any rate, if such a contention is put forward, I find nothing to warrant it in the clauses of the agreement.

A subsidiary point was mentioned, but not argued at any length at your Lordships' Bar, to the effect that since the Broadcasting Corporation, when they performed the play, became audible to people in other parts of the world outside those named in clause 1, therefore there was an infringement of M. Messager's copyright in those other districts. With regard to that contention it is sufficient to say, as was said in the Court of Appeal, that no such case is made on the pleadings, and therefore it is not necessary to consider it in your Lordships' House.

For these reasons, which I think are the same as those which are set out in the judgment of the Court of Appeal, in my view this appeal should be dismissed, and I move your Lordships accordingly.

VISCOUNT SUMNER. My Lords, I agree, and for the same reasons.

It appears to me that the words of clause 1, which contain an explicit grant, complemented by clause 2, which states what is not included in the grant, and followed in clause 5 by provisions as to defeasance and reversion of the rights of representation to the composer and his colleagues, so as to become again their absolute property, are too clear and too express to be compatible with anything but an assignment of that exclusive right. The words in the preamble, and the words in which in various clauses the parties are described as "licensors" and "licensee," are not strong enough in my opinion to override the clauses in question, or to warrant us in giving them an unnatural construction. It may be in the result that there are some uses to which this right can be put from which M. Messager will not be entitled under the agreement to derive any advantage. If so, it is unfortunate, though I think it probable that, especially at the time when the agreement was made, some of them were not and could not be foreseen, and others had little or no importance as a matter of practice. Be that as it may, he, and those who are responsible for drafting this lamentable document, may well regret it; but their regret is not sufficient to induce your Lordships to read the agreement in any other sense than that which it properly bears.

LORD BUCKMASTER. My Lords, I agree, and have nothing to add.

LORD CARSON. My Lords, I also agree.

LORD WARRINGTON OF CLYFFE. My Lords, I also agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 8, 1928.

Solicitors for the appellant: *Gery & Brooks.*

Solicitors for the respondents: *Steadman, Van Praagh & Gaylor.*

[HOUSE OF LORDS.]

H. L. (E.)* 1928 *Nov.* 12.

NASH . . . . . APPELLANT;

AND

LYNDE . . . . . RESPONDENT.

Company—Prospectus—"Issue"—Non-compliance with statutory Requirements—Subscription for Shares on Faith of Prospectus—Damage—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 81, *sub-s.* 1 (*e*); 285.

A company being in want of further capital, a document was prepared by the appellant, who was the managing director, and signed by the other directors, stating the position of the company, that it was proposed to issue 20,000 preference shares, and giving an estimate of the profits after the new capital was available. Attached was an application form for preference shares. A second document was also prepared by the appellant, written on the company's paper and addressed to a fellow director, marked "Strictly private and confidential," which, after setting out the amount of nominal and issued capital, stated the purposes for which the additional capital was required, and concluded thus: "I shall be very happy to discuss this proposition in all its details with any one who is really interested." Attached was a form of application for ordinary shares. Several copies of these documents were given to the appellant's fellow director, who sent a copy to a solicitor, with a request, in substance, that he should find some client willing to provide the capital required. The solicitor sent the documents to the respondent's brother-in-law, and he in turn sent them to the respondent, who, on the faith of the statements they contained, subscribed for 3000 ordinary shares in the company. Subsequently ascertaining that a considerable part of the issued capital had been issued otherwise than for cash—a fact that was not stated in either of the documents—he sued the appellant for damages for the loss he had sustained through the omission by the appellant to comply with the requirements of s. 81, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908.

At the trial the jury found that the two documents were an offer of shares by the company to the public. In answer to the question, whether they were in fact issued to the public, the jury said: "There is no proof of this." The jury further found that the respondent sustained damage to the amount of 2000*l*. After argument, the trial judge held that there had been no breach of s. 81, sub-s. 1 (*e*), and gave judgment for the appellant, but his judgment was reversed by the Court of Appeal:—

Held, that the documents were not issued as a prospectus within the meaning of s. 81, sub-s. 1 (*e*).

Decision of the Court of Appeal [1928] 2 K. B. 93 reversed.

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* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, LORD BUCKMASTER, LORD CARSON, and LORD WARRINGTON OF CLYFFE.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Salter J.

The respondent, who had subscribed for 3000 1*l.* ordinary shares in a private company called the British and Foreign Industrials, Ld., on the faith of the two documents mentioned in the headnote (called in the action documents "A" and "B") sued the appellant, the managing director of the company, for (inter alia) damages for non-compliance with the requirements of s. 81, sub-s. 1 (*e*), of the Companies Act, 1908.

The action was tried before Salter J. and a special jury. The facts are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor, and they are summarized in the headnote.

The questions put by Salter J. to the jury upon the claim under the Companies Act and their answers thereto were as follows :—

(*a*) Was A and B an offer of shares made by the company to the public ?—Yes.

(*b*) Was A and B issued to the public ?—No proof of this.

(*c*) Did the plaintiff sustain damage by reason of the omission to state the issue of shares as fully paid ?—Yes.

(*d*) What damages, if any ?—2000*l.*

Upon further consideration Salter J. held upon these findings that there had been no prospectus "issued" by or on behalf of the company within the meaning of s. 81, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908, and gave judgment for the defendant (the appellant).

The Court of Appeal, by a majority (Atkin L.J. and Eve J. ; Scrutton L.J. dissenting), reversed the judgment of Salter J., and ordered judgment to be entered for the plaintiff (respondent) for 2000*l.*

1928. Oct. 23. *Topham K.C.* (with him *Maurice Healy*) for the appellant. The jury have found that documents A and B are a prospectus, and the appellant cannot quarrel with that finding, but the question is whether the prospectus

(1) [1928] 2 K. B. 93.

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has been "issued" within s. 81, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908. "Issued" there means issued to the public, and it has always been so construed: *Twycross* v. *Grant* (1), per Cockburn C.J.; *Baty* v. *Keswick* (2); *Sherwell* v. *Combined Incandescent Mantles Syndicate* (3); *Sleigh* v. *Glasgow and Transvaal Options.* (4) The jury having found that there was no proof that documents A and B were issued to the public, Salter J. was right in giving judgment for the appellant.

du Parcq K.C. (with him *W. T. Monckton*) for the respondent. A prospectus as defined by s. 285 of the Act of 1908 includes every "invitation offering to the public for subscription or purchase any shares or debentures of a company," and the jury have found that these documents were an offer of shares to the public. That offer having been made, it was sent out as such offer, and ultimately came into the hands of the respondent, who, as the jury have found, sustained damage by reason of the omission to state the issue of shares as fully paid. The Act contemplates, first, an offer to the public, and, secondly, an issue to somebody as such offer. If those two conditions are fulfilled the Act is satisfied. Issue to the public is not necessary. On the findings of the jury the respondent was entitled to judgment.

Topham K.C. replied.

The House took time for consideration.

1928. Nov. 12. LORD HAILSHAM L.C. This case as it comes before your Lordships' House raises a narrow point under s. 81 of the Companies (Consolidation) Act, 1908.

The appellant, Nash, was in the year 1921 the managing director of a company known as British and Foreign Industrials, Ld., which was a company incorporated as a private company under the Companies Act with a nominal capital of 50,000*l.*, of which 40,300*l.* had been issued; of this 40,300*l.* 30,000*l.* had been issued as fully paid in part purchase of patents, etc.

(1) (1877) 2 C. P. D. 469, 540.
(2) (1901) 85 L. T. 18.
(3) (1907) 23 Times L. R. 482.
(4) (1904) 6 F. 420.

In the autumn of 1921 the company required further capital. The appellant prepared a scheme for increasing the capital to 100,000*l.* and issuing 20,000*l.* of preference shares on the terms that every applicant for two preference shares should have the right to apply for and to be allotted one ordinary share at par. The scheme was embodied in a document beginning "Gentlemen," and originally intended for submission to the directors; in that form it was signed by all the directors, and thereafter it was in form a statement to the world of an intention to issue share capital on the terms set out; and attached to this document there was an application form for preference shares. At about the same time the appellant sent to his co-director, Eshelby, a document headed "Strictly private and confidential," and dated September 26, 1921, which contained a number of particulars as to the company. This latter document stated what was the issued capital, but contained nothing to show that any part of the capital has been issued as fully paid: this document seems to have had attached to it an application form for ordinary shares. On September 26 Mr. Eshelby sent both the documents with the application forms attached to one Alcock, a solicitor at Liverpool, enclosed in a letter in these terms:—

"Dear Alcock,

Further to our previous conversation I now have pleasure in enclosing information concerning the proposition as follows:—

1. General Scheme for increase of capital as laid before the Board of Directors together with general particulars. This scheme is merely a basis, and could be altered to accommodate any party proposing to invest a substantial sum.
2. A personal letter from the managing director giving more specific information. This is for your confidential information and use.

I understand you have wealthy clients who might be willing to become shareholders, or you may know of someone

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who would like to start a son in a prosperous concern. In either case, I think, there would be no difficulty in accommodating the conditions to suit your clients.

The additional capital is required wholly for development purposes.

With kind regards."

It appears that Mr. Alcock was a friend of one Major Wrigley; the respondent, Lynde, is a brother-in-law of Major Wrigley; he had been for some years resident in India, and had shortly before this date returned to England, and was looking for a suitable opening in which to invest some capital and find employment for his business experience. On October 4, 1921, Mr. Alcock wrote to Major Wrigley enclosing the document which he had received from Mr. Eshelby, and suggesting that if Major Wrigley thought it was at all the sort of thing which Mr. Lynde was looking for, he, Alcock, would give the respondent an introduction to Eshelby, and he could then investigate the company's affairs for himself. On the following day Major Wrigley sent on the whole of the letters and documents which he had received from Alcock to the respondent. The respondent thereupon went to see the appellant in London, treating Mr. Alcock's letter to Major Wrigley as a letter of introduction; the appellant went through the documents with the respondent, but did not materially add to the information contained in them, and in particular said nothing about the issued capital. Mr. Eshelby made inquiries from Mr. Alcock as to the respondent's antecedents and business, and ultimately on October 18, 1921, there was a second interview between the appellant and the respondent, and an agreement was reached that the respondent should take up 3000 ordinary shares in the company, and should be appointed a director of the company at a salary of not less than 400*l.* per annum upon his return from India in the following spring. This arrangement was duly carried out and the shares were taken up and the appointment was made. Later on the British and Foreign Industrials, Ld., sold most of their assets to a new company

called "John Nash, Ld.," and the respondent became a director of that company at a higher salary.

In the early part of 1924 disputes arose between the appellant and the respondent, and the respondent was dismissed by John Nash, Ld. He thereupon brought an action for breach of contract and recovered damages for his wrongful dismissal. When that action had been disposed of he issued the writ in the present action on June 18, 1926, claiming damages for fraud, with an alternative claim for damages for non-compliance with the requirements of s. 81, of the Companies (Consolidation) Act, 1908.

The case was tried before Salter J. and a special jury on May 26, 1927, when the learned judge left a series of questions to the jury. The jury negatived fraud. The last four questions were in these terms :—

(4.) Was A. and B (these are the documents to which the application forms were attached) an offer of shares made by the company to the public ?—Answer : "Yes."

(5.) Was A and B issued to the public ?—Answer : "There is no proof of this."

(6.) Did the plaintiff sustain damage by reason of the omission to state the issue of the shares as fully paid ?—Answer : "Yes."

(7.) What damages, if any ?—Answer : "2000*l.*"

Upon further consideration of the effect of the jury's answers the learned judge held that in view of the answer to the fifth question there had been no breach of the provisions of s. 81, and he entered judgment for the defendant. From this decision the present respondent appealed to the Court of Appeal, and on February 21, 1928, the Court of Appeal, by a majority, reversed the decision of the trial judge, and ordered judgment to be entered for the respondent for the 2000*l.* awarded by the jury. It is from this decision that the present appeal is brought.

After this recital of the facts of the case it will be convenient to turn to the language of the Act of Parliament.

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By s. 81 of the Companies (Consolidation) Act, 1908, so far as is relevant, it is provided :—

" (1.) Every prospectus issued by or on behalf of a company or by or on behalf of any person who is or has been engaged or interested in the formation of the company must state :—

(*e*) The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash and in the latter case the extent to which they are so paid up and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued."

By s. 285, " Prospectus " is defined as follows :—

" ' Prospectus ' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company."

No point was taken on behalf of the appellant that if the documents A and B constituted a prospectus issued by or on behalf of the British and Foreign Industrials, Ld., the respondent was not entitled to the damages recovered by him upon the answers of the jury ; but it was said that although the documents might constitute a prospectus within the definition section of the Act, s. 81 only applied to a prospectus issued to the public and that there was no evidence that these documents ever were issued to the public.

My Lords, I should be loth to hold that in order to bring s. 81 of the Act of Parliament into operation it must be proved that the prospectus in question had been published to any defined number of persons or that a plaintiff who had been misled by a prospectus which did not comply with statutory requirements must fail in his action unless he could prove that it had been published to persons other than himself.

In my judgment it is sufficient in order to bring s. 81 into operation that the prospectus in question should be proved to have been shown to any person as a member of the public and as an invitation to that person to take some of the shares referred to in the prospectus on the terms therein set out.

But in my opinion there is a narrower ground upon which the respondent must fail in the present case.

If the documents and letters be looked on as a whole I think it is clear that these documents were never issued to the respondent as an invitation to him to subscribe to the shares referred to in the prospectus on the terms mentioned, or at all. They were sent to him in order to give him a general idea of the position of the company in case he might think it afforded a suitable opening in which he could find employment upon the terms of investing a small amount of his capital. In fact, so far as the evidence goes, the proposed increase of capital never took place, and no preference shares were ever issued or allotted. It follows that there was no issue of a prospectus to the respondent. The documents were shown not for the purpose of inviting a subscription upon their terms, but to afford information in case the respondent should wish to negotiate for employment with the company. If the documents had contained any intentional misstatement or concealment of material facts those responsible would have been liable in damages for fraud ; but the jury have expressly negatived fraud, and unless the case can be brought within the language of s. 81 it is conceded that the respondent has no cause of action. In my opinion the respondent fails to show that these documents were ever issued as a prospectus at all, and it necessarily follows that s. 81 had no application to the facts to the present case. It follows that in my opinion the appeal succeeds, and that the judgment of the trial judge in favour of the appellant should be restored with costs here and below. I move your Lordships accordingly.

VISCOUNT SUMNER. My Lords, the question is whether in the circumstances of this case a " prospectus " was " issued " to the respondent within the meaning of s. 81 of the Companies (Consolidation) Act, 1908. This involves two inquiries, first, the meaning of the word " issued," and, second, the application of that word to an accumulation of incidents in themselves perhaps unimportant. The Legislature has not thought fit to define the word " issued," but it is

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possible to attempt some indication of the ideas, which are implicit in it, and a decision that particular facts do not amount to "issue," though in itself a negation, goes some distance to determine positively the content of the word.

Under a direction, which is not complained of, the jury found, and their finding is not challenged, that two documents, A and B, constituted a "prospectus." The question was put in words taken from the definition in s. 281—"Was A and B an offer of shares made by the company to the public?" and the answer was "Yes." Then a question founded on s. 81 was put—"Was A and B issued to the public?" and the answer was "There is no proof of this." Scrutton L.J., agreeing with Salter J., the trial judge, held that s. 81 involves in the word "prospectus" an invitation to the public to subscribe, effected by an "issue" of that invitation to the public, and that, although communication of the prospectus to the respondent was admitted, the jury was not bound to find an issue to the public on that alone, but on the evidence could find either way. Atkin L.J., with whom Eve J. agreed, though not on identical grounds, pointed out that s. 81 does not actually say "issued to the public"; that it is the offer of shares which is to the public and that a document may be a prospectus before and independently of issue, as for example for the purpose of filing a copy of it, and he concluded, that on the undisputed facts the prospectus was issued to a Mr. Alcock, from whom it reached the respondent. As admittedly the prospectus lacked some of the particulars required by s. 81 there was accordingly a breach of that section, which constituted the cause of action remaining undisposed of after the jury had negatived the charge of fraud, and so the respondent got judgment.

My Lords, perhaps I may be pardoned if I repeat a few of the facts in order to make a continuous statement. The documents were typewritten: they were not manifolded mechanically but typed one at a time. About twenty or thirty were ultimately prepared, but what became of them, except the pair which reached the respondent, we do not know. There is no proof that any of the others were in any sense

issued to anybody or at all, but a copy was sent to each of the directors and several were sent in the case of Mr. Alan Eshelby, who was then away, with the idea of getting capital. The names of the four directors were typed at the end in the usual position of signatures and bracketed as "directors." This is the evidence of the typist, who prepared the document. Mr. Eshelby was a friend of Mr. Alcock, a Liverpool solicitor with a moneyed clientèle, and after an interview sent him documents A and B. Mr. Alcock happened to know that the respondent wanted to find a business in which he could invest some money and find some salaried employment, and he sent A and B to a Major Wrigley, the respondent's brother-in-law, to be forwarded to him, if they seemed likely to be of interest. Thus it was that the respondent got them from Major Wrigley. It is quite plain that what the respondent fixed upon, when he got these documents descriptive of the business and its prospects, was the salaried employment, for he at once went to London, saw the appellant, and began a negotiation with him, which resulted in his getting it. He never applied for any of the shares offered in the prospectus, but took up part of the original ordinary shares, which remained unissued. No resolution of the directors for the creation of any of the new shares and no alteration in the articles, enabling such shares to be issued, was ever proved, and there is no evidence that any of these new shares were created or allotted at all.

My Lords, both Atkin L.J. and Eve J. dwell on the transmission of the documents to Mr. Alcock as an issue of the prospectus in his case, whether because they doubted if one invitation and one prospectus could make an "issue," or whether upon the view that a prospectus is "issued" as soon as the machinery of issue is set in motion by instructing an agent of the company to deal with one of their prospectuses. To my mind it is clear on the facts that Mr. Alcock was nothing but an agent to place the prospectus in the hands of possible investors on the company's behalf. This was what he was asked to do in terms. In receiving it he was not receiving any invitation or offer. In sending it on he acted for the company, and the issue, if issue there was, must

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have been made by him and have been an "issue" of a single offer. Unless a prospectus is "issued" as soon as it is shown to any expert in the business of issuing, in order to get his advice as to the kind of person likely to be tempted by that kind of thing, there was no issue to him. I am sure that no one, Mr. Eshelby as little as Mr. Alcock himself, ever supposed that Mr. Alcock would take shares in a company obviously in much need of cash, whose chief business was to popularize a patent dining-room table, without mechanism, but mysteriously capable of having its leaves extracted or inserted without being handled.

Though the word "issue" is not defined in the Act, it must be noticed that in dealing with such a subject-matter the Legislature inevitably uses in many places the idiom of company business. In connection with the issue of a prospectus the word does not mean mere delivery. I am anxious not to say anything that would make the way of the share canvasser less hard than s. 81 makes it already, but to me it is difficult to think of a prospectus being issued without some measure of publicity, however modest, and I think it is also impossible to do so, unless the steps taken are taken with the intention of inducing a subscription by the person invited to subscribe for the securities. I do not think that the term is satisfied by a single private communication between friends, even if they are business friends, or even though preparations have been made for other documents to be used in other communications, if none such take place. In the present case all that constituted the "issue" was that one of the directors, in the course of a general endeavour to find money, was furnished with some copies of these type-written documents and gave one of them to a friend who, as requested, passed it on to a friend of his own. I cannot believe that any one in business would call this the issue of a prospectus.

Mr. Eshelby accompanied the documents with a statement, that the terms of the document were a basis for discussion and might be modified, and I do not think that the document was either intended or taken as anything more

than introductory to other business of a different character. It was not issued as a prospectus of preference shares, but as particulars, with which to raise money in any form. This is not the subject to which s. 81 is directed. Though literally it is true that the issue is not expressly said in the section to be an issue to the public, I think that it must be so in substance, otherwise any private letter, written by a person engaged in forming a company and advising his correspondent to take shares, would become an issued prospectus if other letters were written by him asking others to do the same. "The public," in the definition s. 285, is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole. The point is that the offer is such as to be open to any one who brings his money and applies in due form, whether the prospectus was addressed to him on behalf of the company or not. A private communication is not thus open, and I do not think that the communication to the respondent was any the less private, though it was left to Mr. Alcock to select him, and the document began with the word "Gentlemen."

My Lords, the trial judge asked the jury the question—"Is his financial position worse in consequence of either fraud or the breach of legal duty, which I have been discussing with you?"—and he did so on the authority of *In re South of England Natural Gas and Petroleum Co.* (1), a decision by which he was bound. Before your Lordships this decision is open to review, but as no question was raised on this branch of the case, either here or below, it does not arise for consideration now. I reserve my opinion about it, as also on the question whether the somewhat remote connection of the respondent's subscription of some old shares with the omissions from this prospectus of new ones was sufficient to entitle him to recover damages for a breach of s. 81, when the prospectus had in fact been nothing but the medium of his introduction to the

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appellant personally, with whom he proceeded to discuss the situation, which he eventually obtained.

I think that the appeal should be allowed with costs here and below, and that the judgment of Salter J. should be restored.

LORD BUCKMASTER. My Lords, the question on this appeal is whether the documents referred to as documents A and B constituted a prospectus issued by the respondent as managing director of the company known as British and Foreign Industrials, Ld.—the circumstances attending the preparation and the use of these documents have been already stated and do not need repetition. The sole point upon which I desire to express my view is the true construction of ss. 81 and 285 of the Companies Act of 1908. The first of these sections states what it is necessary that a prospectus issued by, or on behalf of a company or by any person who is or has been engaged or interested in the formation of the company, must contain, and the second defines what a prospectus means. The first thing necessary to notice is that s. 81 contains no reference of any issue to the public. It is sufficient that the prospectus should be issued. The question of what does or does not amount to an issue is a question of fact in each case and is not capable of a rigid and exact definition, but in my opinion it certainly does not necessarily involve a general application impartially made to all members of the public. A distribution of a prospectus among a well defined class of the public would be an issue within the meaning of s. 81. Many illustrations might be given of such a use of a prospectus, for example: A company like the Army and Navy Stores, Ld., originally confined its membership to members of His Majesty's forces; the Civil Service Stores in a similar way was I believe originally limited to members of the Civil Service. There may be, there probably are, assurance companies whose membership is similarly limited to members of the legal or clerical profession; in each of these instances the only source from which membership could originally be obtained would be from a class of people

selected out of the general body of the public and having marked and definite characteristics. A prospectus, the distribution of which was so limited would none the less be issued, and that this is the meaning of the statute is I think made plain by considering that sub-s. 7 of s. 81 excludes from the application of the section a circular inviting existing members of a company to subscribe for shares. This would be unnecessary if an issue to such a limited class were not prima facie included. The definition gives rise to greater difficulty. A document is not a prospectus unless it is an invitation to the public, but if it satisfied this condition it is not the less a prospectus because it is issued to a defined class of the public. Whether a prospectus so limited in its invitation that only a special set of people were invited could be properly defined as a prospectus, it is not necessary for the present case to decide, for the documents A and B were in terms quite general.

They did, in fact, satisfy all the necessary requisites of a prospectus for the purposes of s. 285. The remaining point is, was it issued within the meaning of s. 81 ? Now it is, I think, clear that the issue there mentioned involves issue as a prospectus ; a document answering in all respects to the definition of s. 285 may be used by placing it before people to inform them of some of the facts it contains without its issue as a prospectus. If following on such use application is made for shares in response to the invitation contained, and such application were accepted, the company and the person named in s. 81 might then be prevented from saying that the original use was not an issue, but that does not arise here.

The letter accompanying the documents A and B shows that the original communication to Mr. Alcock was not intended as the issue of a prospectus at all, but merely as a convenient means of enabling him to place facts before people who either on the basis of the document itself or on some modification of its terms might be prepared to come to the assistance of the company.

It was in this sense that it was actually used, and the ultimate arrangement by which the appellant took shares

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was not a response to the definite invitation in the documents. In these circumstances there never was an issue of a prospectus, and I agree with Salter J. in thinking that in consequence the plaintiff must fail.

The action, which originally involved a charge of fraud, was tried by a jury. This was a suitable tribunal for that issue, but when once that was negatived the jury in question 4 were in substance being asked to construe an Act of Parliament while the real question was that which the judge was called upon to decide.

I have only to add that in this opinion silence must not be assumed as assent to the principle upon which the right to damages was established or their amount assessed.

LORD CARSON. My Lords, I agree with the motion proposed by the noble Lord on the Woolsack for the reasons stated by him.

LORD WARRINGTON OF CLYFFE. My Lords, the action in which this appeal arises came before the Court of Appeal and comes before this House as an action by the respondent as plaintiff against the appellant as defendant for damage occasioned to the respondent by the omission from a prospectus alleged to have been issued by or on behalf of a company of which the appellant was the managing director of certain particulars required to be inserted therein by s. 81 of the Companies (Consolidation) Act, 1908.

That section provides that every prospectus issued by or on behalf of a company must state amongst other things (1.) (*e*) the number and amount of shares which within the two preceding years have been issued or agreed to be issued as fully or partly paid up otherwise than in cash. In the case of the company in question certain shares had been so issued, and that fact was not stated in the document alleged to be a prospectus.

The action was tried before Salter J. and a jury. On July 28, 1927, the learned judge, after hearing arguments on the findings of the jury, directed judgment to be entered for the defendant (the appellant). By an order of the Court

of Appeal made on February 21, 1928, the judgment of Salter J. was reversed and judgment was directed to be entered for the plaintiff (the respondent) for 2000*l.*, the damages awarded by the jury. The order of the Court of Appeal was that of a majority (Atkin L.J. and Eve J.; Scrutton L.J. dissenting).

After the judgments which have already been delivered it is unnecessary again to state the facts in detail, and I will content myself with stating the conclusions at which I have arrived with a reference to such of the facts as bear upon them.

The real question, and one which I do not think either of the Courts below have really dealt with, is whether under the circumstances under which the document alleged to be a prospectus was made use of by the representatives of the company any prospectus was in fact issued by or on behalf of the company.

In the Act "Prospectus" is defined as follows (s. 285): "Prospectus means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company."

So far as form is concerned the document in question falls within the definition of prospectus, so far at all events as the preference shares therein mentioned are concerned.

But admitting this, the use made of it does not in my judgment amount to the issue of a prospectus by or on behalf of the company.

The company was registered as a private company, and its articles accordingly prohibit any invitation to the public to subscribe for shares. The issue of a prospectus would therefore be ultra vires the company unless the articles were first altered, and the company would then cease to be a private company.

At the time the document A contained in the compound document was prepared the directors were contemplating an increase of capital, but no final resolution as to the issue of preference shares or as to the mode in which further capital should be obtained was arrived at, and there is no trace of a proposal to alter the constitution of the company.

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The purpose of the document was "That the information concerning the company should be in a condensed form so that the directors might discuss the matter with their friends." (Evidence of the appellant, Appendix, p. 94, F.)

About twenty or thirty copies were typed. There is no evidence as to the mode in which any of these were used except the one communicated to the respondent. It is merely said (Appendix, p. 101, H) that they were in the hands of the directors to use as they thought fit for private information.

One of the directors was Mr. Eshelby. In sending the compound document to Mr. Alcock, through whom it reached the respondent, Mr. Eshelby describes document A as a general scheme for increase of capital as laid before the directors, and says: "This scheme is merely a basis and could be altered to accommodate any party proposing to invest a substantial sum."

I call particular attention to the expression "laid before the directors." I believe this expression describes precisely what had happened.

The result was that the respondent, who was intending shortly afterwards to give up a job in India and was anxious to obtain employment in England, after personal interviews with the appellant and others, and after the directors had satisfied themselves as to his character and position, agreed to take up 3000 1*l.* ordinary shares at par, the directors on their part agreeing to appoint him a director at a salary.

On these facts the conclusion I should come to is that there was no issue of a prospectus by or on behalf of the company. The matter had not gone beyond the stage of proposal or suggestion; there is nothing from which it can be inferred that the directors had decided to invite subscriptions, and the use made of the document is as far as possible from an invitation for subscriptions to the proposed preference shares; no others are mentioned in it as the subject of subscription except as incident to the taking of preference shares.

Am I precluded by the verdict of the jury from giving effect to this view? I think not. The questions and answers relating to this part of the case are: (4.) "Was A and B

an offer of shares made by the company to the public ?"—Answer "Yes." (5.) "Was A and B issued to the public ?"—Answer "There is no proof of this."

As to (4.), if the summing up of the learned judge on this point is referred to it will be seen that he directs their minds to the form of the document alone, and in my judgment it is only fair to the jury that their answer to this question should be considered as referring only to the form. As I have already said, so considered the conclusion I have arrived at is consistent with it.

As to (5.), if the answer means anything material to the case, it means that the plaintiff did not prove the issue of the document to the public. I do not think it was issued at all in any sense of the word material to the case, and this view may supplement but is not inconsistent with the verdict.

The question whether the plaintiff if he made good his case was entitled to compensation or to some other form of relief was not raised here or in the Court of Appeal and, in the view I take, does not arise. In the case of *In re South of England Natural Gas and Petroleum Co.* (1) it was decided by Swinfen Eady J. that the proper remedy is compensation, but this decision is open to review in a proper case. Here, as the question does not arise and has not been argued, I prefer to say nothing about it.

In my opinion the order of the Court of Appeal should be reversed and the judgment of Salter J. restored with costs here and below.

Order of the Court of Appeal reversed, and judgment of Salter J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Nov. 12, 1928.

Solicitors for the appellant: *Godden, Holme & Ward.*
Solicitors for the respondent: *Lake & Son.*

(1) [1911] 1 Ch. 573.

[HOUSE OF LORDS.]

H. L. (E.)* 1928 Nov. 12

RECKITT . . . . . APPELLANT;

AND

BARNETT, PEMBROKE AND SLATER, LIMITED . . . . . RESPONDENTS.

Principal and Agent—Power of Attorney—Power given to Attorney to draw Cheques—Cheque drawn for Attorney's private Purposes—Fraud on Principal—Liability of innocent Payee of Cheque.

The appellant gave a power of attorney in favour of T. to manage his affairs while he was abroad and for the purposes of his affairs to sign and execute all documents which might be necessary or such as T. might think fit. As the power of attorney did not in terms authorize T. to draw cheques, a question was raised thereon by the appellant's bankers, whereupon the appellant wrote to them stating that he wished the power to cover the drawing of cheques upon the bank by T. "without restriction." This letter remained in the custody of the bank.

T. drew a cheque upon the appellant's bank payable to the respondents or order, signed as the appellant's attorney, but, as the respondents knew, in payment of a debt of his own. The respondents accepted the cheque without inquiry and received the proceeds. The cheque was drawn and handed to the respondents by T. without the knowledge or authority of the appellant, who, on becoming aware of T.'s fraud, sued the respondents to recover the amount of the cheque as damages for conversion or as money had and received to the appellant's use:—

Held, (1.) that the power of attorney, as amplified by the letter, conferred no authority on T. to use the appellant's money for the purpose of paying his private debts, but that the authority to draw cheques was limited to the management of the appellant's affairs, and that consequently the issue to the respondents of a cheque drawn on the appellant's account for the payment of T.'s private debt was not within the authority; (2.) that in the absence of actual authority, the respondents, having notice that the appellant's money was being applied for T.'s private purposes, were not entitled to hold the proceeds of the cheque.

John v. *Dodwell & Co.* [1918] A. C. 563 followed.

Hambro v. *Burnand* [1904] 2 K. B. 10 distinguished.

Decision of the Court of Appeal [1928] 2 K. B. 244 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Rowlatt J.

The action was brought by the appellant against the respondents for a declaration that the appellant was entitled

* *Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD CARSON, and LORD WARRINGTON OF CLYFFE.

(1) [1928] 2 K. B. 244.

to recover from the respondents the sum of 200*l.*, being the proceeds of a cheque dated February 5, 1926, drawn by Lord Terrington as the appellant's attorney to the order of the respondents upon the appellant's banking account with Barclays Bank at Hull and fraudulently paid by Lord Terrington in respect of a personal transaction between the respondents and himself; damages for conversion; alternatively, 200*l.* as money had and received by the respondents to the use of the appellant.

The terms of the power of attorney given to Lord Terrington and the facts are fully set out in the report of the case before the Court of Appeal, and sufficiently appear from the opinion of the Lord Chancellor.

Rowlatt J. gave judgment for the appellant for 200*l.* The Court of Appeal, by a majority (Scrutton and Sankey L.JJ.; Russell J. dissenting), reversed the decision of the learned judge and ordered judgment to be entered for the respondents.

1928. Oct. 15, 16. *Schiller K.C.* and *H. G. Robertson* for the appellant. The power of attorney appointed Lord Terrington to act as the appellant's attorney in the management of the appellant's affairs and not otherwise. The letter of August 17, 1915, was addressed to the appellant's bank and remained in their possession and was intended to relieve the bank from liability to the appellant in honouring cheques drawn by the attorney on the appellant's account, and not to enlarge the authority. Assuming that it is to be treated as part of the authority, it expressly refers to the power and must be construed as limited to cheques drawn in respect of the management of the appellant's affairs; it did not authorize Lord Terrington to draw cheques on the appellants' banking account in payment of a debt of his own or to apply the appellant's money to his private purposes. The words "without restriction" have reference to amount only. The respondents took the cheque for 200*l.* with express notice that it was drawn by an agent on the principal's account and with the knowledge that it was being applied to liquidate the private debt of the agent. Prima facie they were taking

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the principal's money, and it is for them to justify the transaction. The fact that, owing to their negligence, the respondents did not notice that the cheque was drawn by Lord Terrington as attorney cannot place them in any better position. *John* v. *Dodwell & Co.* (1) covers this case. *Corporation Agencies* v. *Home Bank of Canada* (2) is distinguishable on the ground of absence of notice.

W. A. Greene K.C. and *Austin Farleigh* for the respondents. The power of attorney was unrestricted in its terms, and the letter was an amplification of the power. It was not a private letter to the bank but was an integral part of Lord Terrington's authority, and could be utilized by persons dealing with him, even though they had not seen it. In *Hambro* v. *Burnand* (3) the third party had never seen the authority given to the agent, yet the transaction was held good as between the third party and the principal. There was there no real authority, but only an apparent authority. The authority to the agent was to act on behalf of his principal, but the agent was acting on his own behalf and not on behalf of his principal at all. If the act done under a power of attorney is warranted by the terms of the power, it is immaterial that the agent is in fact abusing the power by using it for his own purposes. The apparent authority is the real authority: *Bank of Bengal* v. *Fagan* (4); *Bryant, Powis & Bryant* v. *Quebec Bank.* (5) Wherever the act which the agent is purporting to do on behalf of the principal is one which on the face of it is consistent with his duty to the principal, a third party dealing in good faith with the agent is relieved from making any inquiry. In *John* v. *Dodwell & Co.* (1) it was the nature of the business that made it impossible for the transaction to stand. There being here an absolutely unrestricted power to draw cheques on the appellant's account, Lord Terrington's act was one which was consistent with the terms of the power. Assuming that the power of attorney must be read as confined to the

(1) [1918] A. C. 563.
(2) [1927] A. C. 318.
(3) [1904] 2 K. B. 10, 23, 25.
(4) (1849) 7 Moo. P. C. 61, 74.
(5) [1893] A. C. 170, 180.

signing of cheques for the purposes of the appellant's affairs, this is not a power of attorney in respect of any special business. It was not inconsistent with Lord Terrington's duty under the power to buy a motor car and pay for it with the appellant's cheque—a car might have been required to assist him in the management of the appellant's estates—and if the act was not in its nature inconsistent with the terms of the power there was no obligation on the third party to go beyond it. No power of attorney could be safely worked if the third party were bound to satisfy himself in every case as to the particular act of the attorney.

[They also referred to *A. L. Underwood, Ld.* v. *Bank of Liverpool & Martins.* (1)]

The House took time for consideration.

1928. Nov. 12. LORD HAILSHAM L.C. My Lords, this is one of that unfortunate class of cases in which the Courts have to decide which of two innocent parties is to suffer for the fraud of a third party.

For many years past the appellant, Sir Harold Reckitt, appears to have known and trusted a solicitor, originally known as Woodhouse, but who later succeeded to the title of Lord Terrington, by which name I shall refer to him in this judgment. In the year 1915 the appellant was going to France to assist in Red Cross work and gave to Lord Terrington a power of attorney dated February 9, 1915, to enable the latter to manage the appellant's affairs while he was in France. Lord Terrington lodged this power of attorney with the appellant's bank in order that he might draw cheques upon the appellant's account, but upon July 31, 1915, the bank wrote to Lord Terrington pointing out that the power of attorney did not in their view authorize the drawing of such cheques and suggesting that the appellant should write to them stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington "without restriction." In response to that letter

(1) [1924] 1 K. B. 775.

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Lord Terrington obtained for the bank a letter addressed to the bank and signed by the appellant in these terms :—

> "Dear Sirs,
>
> "Referring to the power of attorney which I have given in favour of Mr. H. James Selborne Woodhouse and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction."

This letter was dated August 17, 1915, and ever since that date it has remained in the possession of the bank. In December, 1925, the appellant went to India, and again desired Lord Terrington to act as his attorney. A further power was prepared and executed, but apparently was never used, and it is common ground between the parties that this case must be decided on the footing that it is governed by the authority conferred by the documents of 1915.

The respondents are a firm of motor car dealers from whom Lord Terrington had bought a Daimler motor car some time before the transaction giving rise to the present dispute, and with whom he had an account for garage and for incidental supplies for that car. The respondents had never dealt with the appellant and knew nothing of him.

On January 4, 1926, an arrangement was made between the respondents and Lord Terrington for the purchase by the latter of a Rolls-Royce car on hire-purchase terms under which the respondents took the Daimler car in part payment of the purchase price, and Lord Terrington agreed to pay 350*l.* down, and thereafter to pay 2000*l.* by monthly instalments of 175*l.* each. By the agreement Lord Terrington undertook to retain the car in his own possession; it was provided that if Lord Terrington made default in any monthly payment, or if he died, or had a receiving order made against him, or made any arrangement or composition with his creditors, the respondents should have the right to re-take possession of the car; when all the instalments had been paid Lord Terrington had the option of purchasing the car for 10*s.*, and it was expressly provided that the agreement was personal

to Lord Terrington and not assignable by him. The agreement was obviously drawn up on the footing that Lord Terrington and no one else was interested in the transaction, and it is common ground that the transaction was one made by Lord Terrington personally as principal, and that the respondents always so regarded it.

On February 5, 1926, Lord Terrington drew and issued to the respondents a cheque for 200*l.*, of which 175*l.* was the first monthly instalment of hire under the agreement and 25*l.* was on account of the running account for garage and petrol for the Daimler car for the preceding eight months. The cheque was made payable to the respondents or order and was signed "Sir Harold J. Reckitt, Bart., by Terrington his Attorney." All the signature except the word "Terrington" was affixed by a rubber stamp, the word "Terrington" being written in ink by Lord Terrington. The cheque was indorsed and paid in by the respondents to their own banking account and was duly honoured by the appellant's bank. The respondents made no inquiry as to the authority of Lord Terrington to draw a cheque on the appellant's banking account. They appear not to have noticed the rubber stamp impress and to have treated the cheque as if drawn by Lord Terrington on his own account.

On June 9, 1926, the respondents agreed with Lord Terrington to cancel the hire-purchase agreement and to take back the Rolls-Royce car, and to pay him 100*l.*; and this transaction was duly carried out on the same day. Early in July the appellant ascertained that frauds had been committed by Lord Terrington; and this action was commenced to recover from the respondents the 200*l.* which they had received as the proceeds of the cheque.

The action was tried before Rowlatt J. and the appellant recovered judgment, but the Court of Appeal by a majority (Russell J., as he then was, dissenting) reversed the decision of the trial judge; from that reversal this appeal is brought.

It is common ground that nothing turns upon the fact that the cheque was a negotiable instrument, since the respondents were the original payees. It is common ground also that

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the fact that the respondents made no inquiries as to Lord Terrington's authority and that they overlooked the form of the signature makes no difference in their position; they had on the cheque plain notice that they were receiving the appellant's money, and they can be in no better position than if they had then asked to see and had been shown the authority under which Lord Terrington was acting. Nor is there in this case any question of ostensible authority or any holding out by the appellant of Lord Terrington, since the respondents do not profess to have acted upon any such holding out. It is a simple case of receipt by the respondents of the appellant's money with the knowledge that it was the appellant's money in payment of Lord Terrington's debt. In order to succeed the respondents must show that Lord Terrington had in fact authority to use the appellant's money in payment of his, Lord Terrington's, private debts.

I assume for the purpose of my judgment that the letter of August 17 must be treated as a general extension of the power of attorney and not merely as an instruction to the bank. The question then is whether the power of attorney plus the letter *did* give Lord Terrington authority to use the appellant's money for the purpose of paying his private debts. This is purely a question of construction. It is plain that the letter has to be read in conjunction with the power of attorney to which it expressly refers; when so read it seems to me that the whole authority is expressly limited to acting for the appellant in the management of his affairs; and I cannot construe the addition of the words "without restriction" as entitling Lord Terrington when he is drawing cheques on the appellant's account to do so for any other purpose except for the discharge of the appellant's debts or in the conduct of his business.

My Lords, reliance was placed before your Lordships on the case of *Hambro* v. *Burnand*. (1) In my judgment that case is plainly distinguishable. In that case Mr. Burnand had been given a power of attorney to enable him to

(1) [1904] 2 K. B. 10.

underwrite at Lloyd's certain risks for his principals; it was expressly found that the risks which he did in fact underwrite were those which it was in the ordinary course of the business of an underwriter at Lloyd's to underwrite. Burnand in fact underwrote the particular risks in question in the action in order to assist a company in which he was financially interested. In these circumstances the Court of Appeal held that the act done by Burnand was within the actual authority conferred upon him, although his motive in doing the act was to benefit himself and not his principals; and accordingly they held that the principals were bound by Mr. Burnand's act. In the present case the act which is challenged was the issue to the respondents of a cheque drawn on the appellant's account in payment of Lord Terrington's private debt; in my view this was not within the authority conferred upon Lord Terrington by the power of attorney and the appellant is not bound by it. The case is really on all fours with the case of *John* v. *Dodwell & Co.* (1), and in my judgment Rowlatt J. was right in following that case. The judgment of Russell J. appears to me quite accurate in its reasoning and in its conclusions; but for the fact that I am differing from the majority of the Court of Appeal I should have been content to adopt it as my own. I am of opinion that this appeal succeeds, and I move accordingly.

VISCOUNT DUNEDIN. My Lords, I concur. There are a large number of cases dealing with the same sort of question as is raised here—namely, whether a principal is bound by the act of his agent. I do not, however, think it would be of service to examine and analyse them. Various propositions could be collected from them, but whether a general formula applicable to all circumstances could be hit on I rather doubt. Each case, after all, does depend on its own circumstances, and that is how I prefer to deal with this one. The facts have been stated by the Lord Chancellor and I do not recapitulate them.

(1) [1918] A. C. 563.

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Two leading facts to my mind are these. First, that the respondents knew perfectly well that the debt for the car was for a car which had been purchased by Lord Terrington on his own behalf—part of the price being met by the surrender of an old car of his own; and, second, that on the face of the cheque which they received they saw two things, (1.) that it was Reckitt's account which was being drawn on, not Lord Terrington's; (2.) that Lord Terrington ascribed his power to draw on that account to his position as Reckitt's attorney. The respondents made no further inquiry. They took the cheque for what it was worth. After all, that is what every one does when he takes a cheque; for all he knows the cheque may come back again with "no assets" written on the face of it. That is why extra prudent tradesmen often put as a receipt for an account "paid by cheque." The respondents not having made any inquiry cannot be in a better position than if they had made inquiry. The inquiry would necessarily be whether the drawing and handing over of a cheque on Reckitt's account for a debt of Lord Terrington's was within the power of attorney. Now the power of attorney is clear. It only authorizes Lord Terrington to conduct Reckitt's business, not to pay accounts of his own.

Then comes the letter to the bank. The genesis of it is plain in the correspondence. The power of attorney was silent as to the question of drawing cheques and the bank wanted to be certiorated on this point. The letter refers to the power of attorney "which you have inspected" and then says "I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse" (i.e., Lord Terrington) "without restriction." That seems to me to be exactly the same as if the original power of attorney had had a clause at the end, "and for the purposes aforesaid I wish that Lord Terrington be allowed to draw cheques without restriction." "Without restriction" applies primarily to amount, but I do not so confine it. I think it meant when addressed to the bank, as it was, that the bank should have no concern with what the cheques were for, but should cash them; and accordingly no one in the case has doubted that the appellant

could not have sued the bank. But the drawing of a cheque is one thing, the handing over of that cheque to another person is another. If there had been no knowledge on the part of the respondents that the debt being paid was not Reckitt's but Lord Terrington's debt, and no indication on the face of the cheque that the cheque was being signed by an attorney, I have no doubt that the payment would have been good. But to read the letter to the bank as equivalent to an enlargement of the power of attorney to power to draw on Reckitt's account and do what he liked with the sums so drawn is, I think, to misread the letter.

The distinction between this case and such cases as *Hambro* v. *Burnand* (1) is obvious. In that case the agent was doing the very business he was authorized to do, to issue letters of guarantee. He was doing very bad business and he was doing it from an improper motive. The company guaranteed, had they asked for all documents, would have found that the agent who issued the guarantee was empowered to write the names of his principals to such class of business. Here, unless you can read the letter in the extreme sense I have just mentioned, which I think is absurd, the respondents can find nothing equivalent to that. It follows in my opinion that the respondents cannot keep Reckitt's money which was paid them to their knowledge to liquidate Lord Terrington's debt.

VISCOUNT SUMNER. My Lords, a discussion of the acute difference of judicial opinion which has arisen in this case may, I think, best be approached by first stating four cardinal facts. (1.) When Lord Terrington issued the cheque to the respondents, it was given and taken in part payment of an account, for which he was personally liable. (2.) No circumstance was known to the respondents, and none has been proved to have existed, to show that the motor car was either bought on Sir Harold Reckitt's instructions or was required for or used in the conduct of any of his affairs. (3.) So far as appears, Sir Harold Reckitt's name then first

(1) [1904] 2 K. B. 10.

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became known to the respondents in any connection with Lord Terrington. (4.) The cheque bore on its face, for those who chose to read it, a statement that the drawer was Sir Harold J. Reckitt, Bart., directing payment of his money to the respondents, and doing so by his attorney, Lord Terrington, who signed it. Upon such facts I think it is settled law that the respondents could only hold the proceeds of the cheque as against Sir Harold Reckitt, if Lord Terrington had actual authority, enabling him to utilize his principal's money to discharge his own indebtedness to them.

I will amplify shortly the second and third of these statements. Lord Terrington had been the respondents' customer for several years. They had sold him a Daimler car before the transaction in question, which was taken back in part satisfaction of the price of this car. His name appeared alike in the purchase contract and in their books (Record, pp. 46, 42, and 43). The contract, which is a hire-purchase agreement, is dated January 4, 1926. The price was, in addition to the surrender of the Daimler car, 2350*l.* or in all 2450*l.* (Record, p. 43). Lord Terrington paid 350*l.* on that date, mainly, if not wholly, by cheques which certainly were not drawn on the appellant's account. The debts, for which the cheque in question was given, were, in part, for a continuous garage account in London which had been commenced at any rate as early as June, 1925, and included on January 6, 1926, the cost of A.A. and R.A.C. badges and affixing two baron's coronets on the panels of the new car. In March, April and May, 1926, Lord Terrington is credited with payments of monthly instalments, which again do not seem to have had any connection with the appellant's bank account, and in June, under an arrangement to which the appellant was not a party, the car was taken back and an allowance of 100*l.* made. Lord Terrington was then released. Under the terms of the hire-purchase agreement, the hirer undertook to retain the car in his own possession during its continuance and was entitled on notice to return the car to the respondents, who retained the property. If Lord Terrington made default in payment of any instalment, or

died, or had a receiving order made against him, the respondents could retake possession at once and the agreement was declared to be personal to Lord Terrington and not assignable by him. The respondents would appear to have first come into contact with Sir Harold Reckitt about July 11, 1926, when he called at their showrooms, produced the cheque, and, without giving his name, which they had to ask for, put the question whether they had ever seen it before (Record, p. 47).

My Lords, these details appear to be worth noticing because of a contention which was pressed on your Lordships, that, as between Lord Terrington and the respondents, non constat that the Rolls-Royce car was not purchased for the appellant and on his instructions, say as a birthday present to Lord Terrington himself or to enable him to perform his duties as attorney with comfort, dignity and despatch. This suggestion would not seem to have been made at the trial, but something of the kind was probably thrown out in the Court of Appeal, for Scrutton L.J. says " there are, as suggested, also several honest explanations of the transaction without assuming or suspecting fraud." Several authorities were cited in support of this contention. This case, however, goes very far beyond the mere directorship in the company guaranteed, which was held insufficient to affect Hambro with notice in *Burnand's* case (1), and is stronger even than the case of an agent paying his principal's cheques into his own account, which was held to put bankers on notice in *Underwood, Ld.* v. *Bank of Liverpool & Martins.* (2)

My Lords, this contention does not mean that there is now any doubt of Lord Terrington's fraud or any possibility of assuming his honesty in this matter but that, even if the respondents were put upon inquiry by the form of the cheque, they might have been justified by these explanations, if any such had occurred to their minds, in assuming the actual authority to extend to the issue of the cheque to themselves, though they knew Lord Terrington was their customer, and was paying his own debt. If, however, they had inquired

(1) [1904] 2 K. B. 10, 25. (2) [1924] 1 K. B. 775.

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for and had seen the terms of the power of attorney, they would have found nothing in it to suggest that the attorney required a motor car—and such a motor car—for the proper exercise of the power. There was indeed a paragraph giving power to "let and manage" Sir Harold Reckitt's property in Sussex, but the context showed that this referred not to the duties of a bailiff but to those of a solicitor, which would be performed through the post or by the occasional despatch of a clerk. It was not put to Sir Harold Reckitt in cross-examination or elicited from any of the witnesses from the respondent company's business that the car either was in part required or even was imagined to be required for any purposes of Sir Harold Reckitt's affairs. Rowlatt J. says: "The question here all turns upon the effect of the circumstance, that it was taken by the defendants . . . . knowing that it was being used to liquidate the private debt of the agent. That this was to all appearances for the private debt of the agent, as it turned out to be in substance, I think cannot be doubted for a moment." In my opinion, my Lords, no other conclusion could have been supported by the evidence.

I understood, however, that it was further contended to be sufficient for the respondents, if the appellant should fail to establish that no hypothesis was possible except that of an application of the appellant's money to Lord Terrington's own purposes without his consent or authority. No authority for so extensive a proposition was cited and I do not think it can be accepted. If the respondents could show that the purpose, for which Lord Terrington issued the cheque to them, as they knew, was really and substantially consistent with the exercise of his power as attorney, they might rebut the liability which arises prima facie from its having been taken in discharge of his own debt, but the burden is on them and is a real one, for no mere academic hypothesis will serve. In fact, before this argument was launched, nobody had ever thought that proof of such consistency was possible.

There remains the question of the actual authority conferred on Lord Terrington. For this purpose Sir Harold Reckitt's

letter to his bank of August 17, 1915, is admissible in evidence against him as being his own statement of the authority he had given to Lord Terrington, though it is in form a letter to his bankers stating what he has done and is not a deed addressed to "all men"; but it must be read with the power of attorney, to which it refers, in order correctly to ascertain its meaning. The words "without restriction" (which are not said to be terms of art or to have any special meaning among bankers) may either mean cheques free from the restrictions contained in the power of attorney which the letter supplements, or cheques drawn in an unrestricted form as far as possible. I do not see how a third meaning is grammatically possible—namely, that it is Lord Terrington and not his cheque that is without restriction, or that there is to be an unrestricted power of drawing cheques and also of utilizing them, honestly or dishonestly. Assuming that the express power to draw carries with it an implied power to issue cheques, when drawn, still what is unrestricted is only the drawing of cheques and the subsequent issue must be subject, as the general power itself is, to the exercise of the power being for the purposes of the principal. It is unreasonable so to interpret the words that, although he can only use the power of attorney for the principal's benefit, he can under the letter, by drawing enough cheques on the appellant's account, transfer all the principal's property into his own pocket or apply it to his own use. We know that in fact nothing of this sort could have been meant by the parties to the power, for such self-sacrificing trust would be beyond the limits even of romance and it would be wrong to attach to words, which at most are ambiguous, a meaning which bears no relation to the realities of life. It was admitted at the trial, as I think rightly, that Lord Terrington had no power to draw cheques for his own purposes under either document. Now as the power did not extend to drawing cheques at all, the letter does not remove any restrictions imposed by it on Lord Terrington's cheques, and as ample effect is given to the words by referring them to the form of the cheques themselves, I think we should press them no further. It was at the bank's instance and

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for the purpose of enabling it to honour cheques that this particular power was asked and given. Under its protection they could pay without being called upon, as Mathew L.J. puts it in *Hambro* v. *Burnand* (1), to investigate Lord Terrington's motives and ask what he was going to do with the money. If Lord Terrington should draw a cheque on Sir Harold Reckitt's account to a named payee, or to none, with restricted negotiability or without it, whether open or crossed, the bank was to the extent of the available balance entitled and bound to meet it, but a person, who took such a cheque with notice that Lord Terrington was an attorney only, and knowing from the transaction itself or otherwise that he was being paid for Lord Terrington's benefit and not in pursuance of the affairs of Sir Harold Reckitt, would take nothing by the transaction. It is worth while to add that if the letter is considered as ambiguous, that only assists persons who, having seen it, take it in a sense which it is reasonably capable of bearing and act accordingly, whether that sense be the right one or not. The respondents were not in such a position. They had not acted on or even seen the letter, though, as it was part of Lord Terrington's authorization, they had general notice of it by the form of the cheque, which they did not follow up by any inquiry.

As to the authorities cited, I think that *John* v. *Dodwell & Co.* (2) is in point, but the others are either distinguishable or are beside the mark. The knowledge and the notice, which the respondents had of Lord Terrington's limited power and of the purpose to which he was actually putting it, are sufficient to fix them with liability to the appellant: see *Corporation Agencies* v. *Home Bank of Canada.* (3) There was no holding out and no estoppel: no mere appearance of authority but an actual written expression of it; no series of acts done by the agent, such as would constitute a genus, or class of acts, which the principal had put the agent in his place to do; no general terms descriptive of an employment exercised by him. On its true construction the power did not cover

(1) [1904] 2 K. B. 10, 25. (2) [1918] A. C. 563.
(3) [1927] A. C. 318.

the thing, which Lord Terrington did and, as the respondents have no better title than he purported to give them and cannot improve their own position by failing to ascertain Lord Terrington's, they cannot hold the proceeds against Sir Harold Reckitt, but his appeal must succeed.

LORD CARSON. My Lords, I agree. On the facts as enumerated by your Lordships it is clear (1.) that the cheque was used to liquidate the private debt of Lord Terrington, (2.) that the defendants knew it was so used, and (3.) that the form of the cheque gave them notice that the money was not the money of Lord Terrington. In that state of circumstances there is no evidence or any possible inference which can be drawn that the agent was applying his principal's money in discharge of any possible liability of his principal. That being so, the case cannot be distinguished from the case of *John* v. *Dodwell & Co.* (1), already referred to, decided by the Privy Council, and which has not been questioned in the course of the argument.

LORD WARRINGTON OF CLYFFE. My Lords, the question in this case is whether the appellant is entitled to recover from the respondents the sum of 200*l.*, the proceeds of a cheque for that amount drawn and signed by Lord Terrington as attorney for the appellant upon the appellant's bank at Hull and delivered by Lord Terrington to the respondents in payment of a debt owing to them by Lord Terrington personally. The cheque was presented to the bank by the respondents and duly honoured.

On November 11, 1927, Rowlatt J. pronounced judgment in favour of the appellant. The Court of Appeal by a majority (Scrutton and Sankey L.JJ.; Russell J., as he then was, dissenting) reversed this judgment and directed judgment to be entered for the respondents with costs.

By a power of attorney under seal dated February 9, 1915, and filed on May 29, 1916, the appellant appointed Lord Terrington (then Harold James Selborne Woodhouse), of 49 St. James Street, London, in his name and on his behalf

(1) [1918] A. C. 563.

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to do all or any of the things therein specified including in clause 11 power for any of the purposes thereinbefore mentioned to sign all documents which should be necessary or the attorney should think fit. The purposes specified were all purposes connected with the property and affairs of the appellant.

In July, 1915, the power of attorney was presented to the appellant's bank by Lord Terrington for registration, and on July 31, 1915, the bank wrote a letter of that date to Lord Terrington stating that they could not find in it any authority for him to draw cheques upon the appellant's account and suggesting that the appellant should write to them stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington without restriction.

Accordingly on August 17, 1915, the appellant wrote a letter to the bank stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington without restriction. This letter was retained by the bank.

Under the authority conferred by the power of attorney and the letter numerous cheques on the appellant's account were drawn by Lord Terrington, the form used for the signature being "Sir Harold J. Reckitt Bart. by Terrington His Attorney."

In this form the words except the signature "Terrington" were impressed by a rubber stamp, the signature being written with a pen and ink.

In the case of the actual cheque in question the words impressed by the rubber stamp are somewhat faint but are quite legible.

On November 19, 1925, the appellant executed a further power of attorney in favour of Lord Terrington which included (clause 17) a power to draw cheques deemed necessary or proper in relation to the business or affairs of the appellant. It does not appear that this power was ever communicated to the bank, and it is common ground that the power of February, 1915, and the letter of August, 1915, are alone material to the case.

On January 4, 1926, Lord Terrington signed a hire-purchase agreement for the purchase from the respondents, who carried

on business in London as garage proprietors and agents for the sale of motor cars, of a Rolls-Royce car for the sum of 2350*l.* in addition to his present Daimler car taken in part payment, payable 350*l.* and the Daimler car down, and the balance plus 5 per cent. interest in monthly instalments of 175*l.* on the fourth day of each month.

The Daimler car had been bought by Lord Terrington some years before from the respondents. There is no question that in fact this transaction was purely personal to Lord Terrington and was in no way connected with the business or property of the appellant. The 350*l.* was paid by Lord Terrington out of his own moneys and the Daimler car was his own property.

The first monthly instalment of 175*l.* became due on February 4, 1926, together with a sum of 25*l.* for sundry garage expenses. It was this sum of 200*l.* which Lord Terrington fraudulently paid out of the appellant's money.

The respondents clearly had notice by the cheque itself that the money was money of the appellant. It is true they say they did not observe the form of the signature, but in my opinion they cannot be heard to rely on their own carelessness or that of their clerks in this respect.

On this state of facts it seems to me quite plain that the respondents would be held both at law and in equity to be liable to repay the money in question to the appellant unless they could establish that Lord Terrington had either actual or apparent authority to pay his own debts with his principal's money.

Had he then such authority? In my opinion he had not, and, but for the difference of opinion in the Court of Appeal, I should have thought that the case was a very plain one.

In this case there is no difference between the "actual" authority and "apparent" authority. The authority and the only authority was contained in the power of attorney and the letter to the bank. The power of attorney is clearly confined to the affairs of the principal, and the letter merely informs the bank that such authority extends to the drawing of cheques. This letter was required by the bank for their

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own protection and was retained by them. The words "without restriction" seem to me to mean only "without limit of amount." But even if they have a wider meaning they were clearly intended only to afford protection to the bank inasmuch as they have no means of knowing, and have no liability in the ordinary way of business of inquiring into, the purpose for which cheques are drawn, and I cannot follow the majority in the Court of Appeal in the view that third parties and the bank are in the same position as regards the authority given by the letter. We have therefore, if I am right in the view I have expressed as to the authority of Lord Terrington, the simple case of a man who receives money, which he is told, when it is paid to him, is money of another, and notwithstanding this fact insists on retaining it. This in my judgment he cannot do, and therefore the appeal ought to be allowed and the judgment of Rowlatt J. in favour of the appellant restored with costs here and below.

So far I have dealt with the matter on principle without reference to authorities. Is there any authority which compels me to refrain from giving effect to the conclusions at which I have come?

I can find none in those that have been cited to us. The one most relied upon by the respondents was *Hambro* v. *Burnand*. (1) In that case the agent in question had authority to sign underwriting contracts at Lloyd's on behalf of his principals. Among the contracts which he was entitled to sign were guarantee policies. He signed a number of such policies in cases in which he had a strong personal interest in the guarantee being given. The insured took the policies in good faith and without notice of any impropriety. It was held that as the contracts were within the authority of the agents, the principals were bound by them, the motive of the agent being immaterial. In the present case to sign and deliver cheques in payment of his own debts was not within the authority of Lord Terrington as an attorney acting in the affairs of another, and the payees had notice by the cheque itself that he was dealing for his own private benefit with

(1) [1904] 2 K. B. 10.

money of his principal. The two cases are in my opinion plainly distinguishable.

If an authority in favour of the views I have expressed were wanted it is to be found in the decision of the Judicial Committee in *John* v. *Dodwell & Co.* (1) The principle on which I think such questions as the present ought to be decided is expressed in terms applicable to this case in the judgment of Lord Haldane, and with all respect to Scrutton and Sankey L.JJ. I can find no grounds of distinction.

I think the very clear judgment of Russell J. ought to prevail, and I therefore concur in the motion proposed by the Lord Chancellor.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Nov. 12, 1928.

Solicitors for the appellant: *Nicholl, Manisty & Co.*
Solicitors for the respondents: *Charles Humphries & Co.*

(1) [1918] A. C. 563.

[HOUSE OF LORDS.]

H. L. (E.)* 1928 Nov. 30.

OWNERS OF STEAMSHIP STRATHFILLAN . . . . . } Appellants;

AND

OWNERS OF STEAMSHIP IKALA . . Respondents.

THE IKALA.

Shipping—Collision—Damages for Detention—Vessel employed in carrying Owners' Goods—Loss of Profit—Measure of Damages.

The appellants were importers of oil into this country. In 1917, during the war, the amount of oil which the appellants were allowed to import for that year was fixed by the Government. The appellants owned two ships, the *S.* and another, for the purposes of this trade, but they had to hire outside tonnage to carry the bulk of the quota. In August, 1917, the *S.* was run into and damaged by a ship belonging to the respondents, who agreed to pay 70 per cent. of the proved damage. In assessing the damages for the loss of the use of the *S.* during the collision repairs, the Registrar allowed compensation on the basis of the net cost of chartering another vessel to take her place during the period of detention. After the repairs were completed the *S.* made one more voyage, which enabled the appellants to complete the quota, and, apart from the collision, she could not have made a second voyage to bring in part of the quota during that year:—

Held (by Viscount Sumner, Lord Buckmaster, and Lord Warrington of Clyffe; Lord Hailsham L.C. and Lord Carson dissenting), that the evidence did not justify the Registrar in inferring that the extra tonnage was hired as a consequence of the collision, and that the assessment was made upon a wrong basis; and that the case should be remitted to the Registrar to assess the compensation due to the owners for the loss of the use of the vessel as a profit-earning vessel.

Decision of the Court of Appeal [1928] P. 86 affirmed.

Appeal from an order of the Court of Appeal (Scrutton L.J., Atkin L.J., and Eve J.) (1) reversing a decision of the President, which affirmed the assessment of damages by the Registrar and Merchant arising out of a collision between the steamship *Strathfillan* and the steamship *Ikala*.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of the Lord Chancellor.

* *Present:* Lord Hailsham L.C., Viscount Sumner, Lord Buckmaster, Lord Carson, and Lord Warrington of Clyffe.

(1) [1928] P. 86.

1928. Oct. 25. *Dunlop K.C.* and *R. F. Hayward* for the appellants.

Aylmer Digby K.C. and *R. H. Balloch* for the respondents.

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1928. Nov. 30. LORD HAILSHAM L.C. My Lords, the question involved in this case relates to the measure of damage recoverable against a wrongdoer for the loss of use of a chattel.

The appellants are an English company whose business consists in the importation to this country and the sale here of lubricating oil. In the year 1917 the business of importing oil was strictly regulated by the British Government; the question of the proper use of tonnage was of paramount importance to the nation, and the Government decided the amount which each importer should be allowed to bring in; the actual quota allowed to the appellants was 1,188,700 barrels. The appellants owned two steamers, one of which was known as the *Strathfillan*. These two vessels were exclusively used by the appellants for the importation of oil, but were quite insufficient to carry the quantity which they were allowed to import. The British Government allotted space in liners to the appellants to the extent of 657,400 barrels, and the balance of the necessary shipping space had to be provided by the chartering of outside vessels with the permission of the Shipping Controller. On August 8, 1917, the *Strathfillan* was damaged by collision with the *Ikala;* the owners of the *Ikala*, who are the present respondents, admitted their liability to pay 70 per cent. of the damage thereby occasioned, and the present suit is brought by the appellants to ascertain and recover that amount. The appellants delivered a claim consisting of nine different items; the only item now in dispute is the claim for loss of use of the vessel, which was put at fourteen days and claimed at 574*l.* 15*s.* 2*d.* per day. The damages were assessed by the learned Registrar and Merchants; they allowed thirteen days as the time during which the appellants were deprived of the use of the *Strathfillan* by reason of the collision, and that finding is not in issue. No evidence was called on behalf

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of the respondents at the reference, and the only relevant evidence was that of Mr. Balsillie, the assistant manager of the shipping department of the appellant company. After explaining the regulation of imports and the space allowed to the appellants in liners, Mr. Balsillie stated that in addition to the *Strathfillan* the appellants had a similar vessel slightly larger, "but the majority of the transport that we had to provide for our proportion was in chartered vessels, which chartered vessels were all controlled, and we had to get permission from the Shipping Controller even to charter them. If any of our own vessels were delayed that increased the quantity of chartered tonnage that we had to get." He went on to explain that when they ascertained that the *Strathfillan* would be delayed they tried to obtain permission from the Government to purchase another vessel, but that that plan failed; that the appellant company hired extra tonnage and paid 230*s*. on a net charter form; and he stated that the appellants' claim for detention was on the basis of what they had paid themselves to do the work the *Strathfillan* would have done. In re-examination a question was put to him in this form: "In consequence of not getting her to carry goods you had to charter at these high rates?", to which he replied: "Yes, we had to maintain it." This answer led to a further cross-examination on behalf of the respondents, which began by the question: "Do you say because of the fourteen days' delay by this collision you had to charter in October?"; the answer was: "Certainly, to the extent of that loss." He was asked to explain the answer, and he said: "It means this; that she was fourteen days delayed repairing the actual damage, and then there were another eleven days. There were twenty-five days' use of that vessel gone—lost for ever. Twenty-five days' loss of work puts the whole programme back, which means that we have to charter the equivalent of the work that vessel would have done during those twenty-five days, and we charge you for your proportion." A little later on he said: "Every delay had to be made up, at the cost we paid for people to do the work."

The learned Registrar and Merchants allowed the appellants a sum equal to thirteen days' loss of use of the vessel at 550*l.* per day. In the Registrar's reasons he says: "The plaintiffs claimed for the loss of time on a commercial basis, and evidence was given that in consequence of this delay of the *Strathfillan*, and for other purposes it was necessary to charter other vessels, and this evidence was uncontradicted. The rate of hire at that time for vessels carrying oil was fixed by the Ministry of Shipping, and the claim was made on this basis."

The respondents appealed from this decision to the President of the Probate, Divorce and Admiralty Court, but the learned President confirmed the Registrar's award. From this decision the respondents appealed to the Court of Appeal, who reversed the decision and remitted the case to the learned Registrar and for the purpose of assessing the amount of compensation due to the owners of the *Strathfillan* for the loss to them for thirteen days of the use of the said vessel as a profit-earning vessel.

The Court of Appeal were struck by the fact that the appellants in fact imported into this country the whole of their quota for 1917, and that the *Strathfillan* completed her last voyage in 1917 on December 8, so that even if the voyage had been completed thirteen days earlier it would have been impossible for her to make another voyage during that year. The Court of Appeal deduced from this fact that even if there had been no collision the appellants would have been unable to make use of the *Strathfillan* during the thirteen days, and therefore they held that it was impossible to allow to the appellants the cost of hiring a neutral ship as a substitute for that period.

My Lords, in my view this decision is based upon a fallacy. It is quite true that the appellants could not have used the *Strathfillan* in any case to bring in part of their 1917 quota during that year. But the evidence showed that the *Strathfillan* was being used during the whole of 1917 and 1918, except when she was in dry dock for the repairs due to the collision and for certain alterations which the owners

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effected at the same time. It was proved that in October and November of 1917 the appellants were chartering neutral vessels to carry oil to this country; and in my judgment the fact that the 1917 quota was completed and that the *Strathfillan* contributed her full share to that quota is quite irrelevant. The work that she would have been doing during the period of her disablement was the work which she actually did as soon as the disablement came to an end—namely, the importation of oil for 1918.

Under these circumstances, the observations made by the Court of Appeal as to the possibility of what Lord Atkin describes as "infructuous use of the vessel" did not arise. In my judgment the measure of damage for the loss of use of a commercial chattel such as this which was being used by the injured party for commercial purposes is the commercial value to him of the chattel during the period for which he was deprived of its use. If in fact he hired another chattel to take its place the hire paid would prima facie be the amount of the damage which he sustained; but if no other chattel could be found to replace the injured one I do not see that that alters the measure of damage; it merely deprives the Court of one possible means of assessing it. In such a case other methods of ascertaining the loss must be employed; and the obvious method is to find out what was the market value of chattels of that kind during the time that the plaintiff is deprived of their use, and to see whether the facts prove that it was worth the plaintiff's while to pay at least that amount for such a chattel. In view of the conditions which prevailed as to tonnage at the end of 1917, the suggestion that unless the appellants prove that they actually hired a particular vessel to replace the one damaged they may have to rest content with interest on the capital cost of the damaged vessel for thirteen days is to my mind so repugnant to common sense and reality as to amount to a denial of justice to the injured party.

In the present case it is proved by Mr. Balsillie's evidence that the appellants were in fact chartering neutral vessels at 230*s.* a ton at this very period to do exactly this work, and

it is a fair inference to draw that the work done by the *Strathfillan* was of at least this value to them. From the 230*s.* must of course be deducted the actual cost of running the *Strathfillan;* this is the figure which has been assessed by the Registrar and Merchants. In my judgment there was ample evidence to justify them in taking this course, and I agree with the learned President in thinking that there is no ground for interfering with their decision. It follows that in my opinion this appeal should be allowed; but as I understand that the majority of your Lordships take the contrary view the case will go back to the Registrar and Merchants to assess the damages upon such evidence as the parties may be advised to adduce.

VISCOUNT SUMNER. My Lord, the learned Registrar in his report states as the ground on which the damages were awarded in this case, that "evidence was given that in consequence of this delay of the *Strathfillan* and for other purposes it was necessary to charter other vessels." This, as Scrutton L.J. points out, was on the footing of hiring a substituted ship to take the *Strathfillan's* place, while she was under collision repair. For those actual days no ship was hired but, some few weeks after that repair was finished, the appellants chartered the *Kjobenhavn* and three other foreign ships, all then in European waters, at such substantial intervals that if the 1917 quota of oil had to be brought in in 1917, they could have carried none of it. The case made was that, as the delay to the *Strathfillan* had to be made up at some time, a proportion of the freight paid for ships subsequently chartered, corresponding to the fourteen days' delav was legitimately charged. The appellants' trade was that of importing lubricating oil from the United States into the United Kingdom. They kept the *Strathfillan* for this trade and never hired her out or used her in any other, nor did they ever intend to do so. Oil in 1917 was strictly controlled by the Ministry of Munitions on the principle of allocating so much for import to each company engaged in the importation, the Shipping Controller undertaking to give space

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in liners for a certain quantity, leaving the importers to provide tonnage for the rest of their allocated quantity either in their own ships or by chartering others, as they chose. On this point the words of the appellants' witness should be quoted from the shorthand note :—

"Q. 12. Would this be a convenient opportunity for you to explain what were the arrangements about the transport of this oil? Were they controlled in any way by the Ministry of Munitions?

"A. Yes, the whole of the lubricating oil imports in 1917 and before 1917 were controlled by the Ministry of Munitions. They stated the quantity, which would be permitted to be brought into the country, and the whole of the companies were controlled. The quantity, which was allowed to be brought in in 1917, was the quantity imported by the companies in 1915, plus 20 per cent.

"Q. 13. Can you say what was the quota allowed to be imported by your company in 1917?

"A. We imported 1,188,000 barrels." (1)

On the words of this statement Scrutton L.J. justly says, and Atkin L.J. uses language to the same effect: "They could not import more than 1,188,700 barrels a year and they did in 1917 import that quantity. The *Strathfillan* after the collision made another voyage in 1917 to produce that quota and could not, if there had been no collision, have made a second voyage. She had no time to make such a voyage and, if she had, it would exceed the permissible quota."

I think it is plain that, as the evidence was given and unless it is altered, the entire 1917 quota was brought in and, as it had to be brought in in 1917, none of the foreign vessels chartered after the *Strathfillan* collision could have carried any part of it. That work was completed by the voyage that she made after her repairs were completed. Accordingly the assumption of fact, on which alone the report was founded, failed entirely.

My Lords, it was evident that the appellants had suffered some presumable damage from loss of use of their ship

(1) It was agreed that the correct figure was 1,188,700.

and the Court of Appeal, instead of entering judgment for the respondents, made the order now under appeal, remitting the case to the Registrar to assess the compensation due for the loss for thirteen days of the use "of the vessel as a profit-earning vessel."

The words "profit-earning vessel" of course mean as a vessel out of whose use they might obtain in the course of their trade a measurable profit. It does not suggest that a profit as carriers of oil for hire is to be looked for, since she was only used for carrying the owners' own oil.

The order was an open one and leaves the appellants quite free to try again. If the Registrar's decision was not to stand, I do not suppose they could have been more favourably dealt with, and it is clear to me that it could not. For the reasons stated by Scrutton L.J., the evidence as given did not support the finding.

Two contentions, as I understood it, were advanced for the appellants, the first that the evidence, as given, was a slip on the part of the witness, which misled no one and was indeed otiose in any case, since the Registrar from his general experience knew the true facts; the second that in any case "a commercial measure" of damage ought to be adopted—namely, what the ship was worth to the owners, which, as she was bought and maintained to save them from having to pay hire, was the same thing as the current rate of hire, which otherwise they must have paid. My Lords, in so far as we are asked to say that the expression of this evidence, as given, was a mere slip and therefore to reverse the order of the Court of Appeal, I do not agree. To say "allowed to be brought in in 1917," when what was the truth, as everybody knew, and what was meant was "allowed for 1917 to be brought in when they chose," is a surprising slip of the tongue and I should have expected it to have been at once corrected at the instance of the appellants' counsel or of the Court—(it was of course no affair of the counsel for the respondents)—but, instead of this, the very expression is taken up and repeated in the examining counsel's next question. Further, it was not the appellants' case,

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before this evidence was taken, that other ships were chartered because of this delay to this ship. The chartering was merely said to have been "owing to shortage of tonnage." During the evidence, in answer to Q. 21 "in consequence of the delay did you have to do anything with regard to supplying the loss caused by her delay?" the witness said "Yes, in addition to the loss of the use of the *Strathfillan*, the ravages of the submarines were very bad at this time." Chartering only began on October 9, the cost of which was claimed on the basis that it was "what we paid others to do the work the *Strathfillan* would have done" (Q. 28). To say the least of it the witness was not very decided in his support of the present case, and when in the last question in re-examination he was given a chance of mending matters—(Q. 189) "In consequence of not getting her to carry goods you had to charter at those high rates," and the answer came "Yes, we had to maintain it" (that is to maintain the service), further cross-examination at once began, which the Registrar would obviously not have allowed unless this question and answer had been new matter. As the evidence stands, I cannot dispose of this point as a harmless slip of the tongue on the part of the witness or a play upon his words by the Court of Appeal. If this case is to be made, evidence should be given, by the same witness or by others, which will do it clearly. As for the knowledge already possessed by the Registrar, no one recognizes more fully than I do how greatly the despatch of business in the Registry is facilitated by the knowledge, that the tribunal is already possessed of much information and invaluable experience, but reliance on this really rests on the tacit consent of the parties, and must not be pressed so far as to excuse the absence of necessary evidence. In the Registry the right to take judicial notice in regard to matters constantly before the tribunal probably extends a good deal further than would be the case in the King's Bench Division, but I do not think that the Registrar can be called on in 1927 to take judicial notice of the precise regulations applied to changing circumstances by a temporary Government Department in 1917, which must have required alteration

from time to time, nor do I expect that the Registrar would claim that in this particular matter he was confident that he could do so. No doubt at the further hearing evidence will be forthcoming.

It is inadvisable to say anything now of the facts that may be proved or to prescribe a measure of damages applicable to evidence not yet given. I only wish to say two things. If, as was the case at the previous hearing, the appellants' case is to be that the delay upset the general current of their trade, which had to be maintained in spite of it, I think that the extent and cost of this upset must be proved and must be causally connected with the collision in accordance with the ordinary rules of law as to damage. A ship's day is not like a unit of currency, always good for so many shillings. It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay. I do not, any more than the Court of Appeal did, expect or think it would be satisfactory that no sum or that only an insignificant sum should be recoverable, and, if the evidence can be properly given, which the appellants appear to have thought they had really given on the previous occasion, it may be unnecessary to reconsider the question of damages at all.

I think the appeal should be dismissed and I move your Lordships accordingly.

My noble and learned friend Lord Buckmaster desires me to say to your Lordships that he concurs in the opinion that I have just read.

LORD CARSON. My Lords, I agree with the conclusion arrived at by the noble Lord on the Woolsack. It is, I think, evident that the main contest raised by the respondents before the Registrar and the President was that, as the appellants were not in a position to hire out the *Strathfillan* but could only use her for the carriage of their own oil, the decision of *The Susquehanna* (1) applied, and that the proper

(1) [1926] A. C. 655.

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measure of damages to allow was interest on the capital value of the vessel. I observe also that in the respondents' printed case in this House that contention was put forward in the forefront of the reasons stated. No such contention has been however argued before your Lordships. The judgment of the Court of Appeal and of your Lordships who take a different view from that at which I have arrived, seems to lay down that the owner is entitled as damages to the loss which he sustains by losing the use of his profit-earning vessel in the trade of carrying his own goods for sale for thirteen days, and the question is how it is suggested that measure is to be measured. Now the Registrar has found and made his assessment of damages on the basis that in consequence of the delay caused by the accident it was necessary for the appellants to charter other tonnage to enable them to carry on their business and to the extent of the expense incurred for the thirteen days for which they had lost the use of the *Strathfillan*. On appeal to the President, who confirmed the finding of the Registrar, the President stated that " the evidence given before the Registrar in the present case satisfied him that the plaintiffs were importing lubricating oil on a quantified scale for sale under stabilised conditions and at stabilised prices and that in order to import the full quantity allotted to them they necessarily employed extra tonnage equivalent to that of the *Strathfillan* and paid for such tonnage at the authorized rate of 230*s*. per ton per voyage." That there was evidence to support the finding of the Registrar and the conclusion of the President seems to me clear. It has been already partly quoted by the noble Lord on the Woolsack, and I would only like to add other quotations from the evidence of Mr. Balsillie in his direct examination. " (Q.) Did you hire extra tonnage ? (A.) Yes." Again : " (Q.) Have you prepared your claim for detention on the basis of the cost to you of these chartered vessels ? (A.) Yes, what we paid others to do the work the *Strathfillan* would have done and the incidental expenses which accrued during the time " and again " (Q.) To summarize the matter before I go

into the detail of it, but for this collision what would the vessel have done? (A.) She would have completed discharging all her cargo, bunkered, loaded empty barrels for safety purposes and proceeded out to load another cargo of lubricating oil for us." Now in addition to this evidence, which was not contradicted, we were informed that the charterparties which were in evidence showed that from August to November four ships were chartered of an aggregate tonnage of 13,700 tons, and that such ships were making voyages which, as the log books showed, in some cases could only terminate in 1918, though whether such cargoes were part of the 1917 quota or of the 1918 quota does not appear, nor do I think it is material. It was in my view clear on the evidence that continuous voyages were in progress after August 8, and that the *Strathfillan*, if available, would have been continuously employed, and would have been able to commence her last voyage in 1917 thirteen days earlier than she did, and would thus have made an earlier delivery of oil in 1918. Under these circumstances I cannot myself see why it should be necessary to point to the exact ship which supplied the tonnage necessitated by the loss of the use of the *Strathfillan;* it follows as a reasonable deduction, especially when you consider the difficulties under which the business was carried on during this war period which was graphically described by Mr. Balsillie when he said: "The tonnage position was very desperate at this time."

The Court of Appeal seem to have passed their judgment and to have disregarded Mr. Balsillie's evidence on the ground that as the *Strathfillan* after the collision made another voyage in 1917 she could not, if there had been no collision, have made a second voyage that year, as the quota for 1917 could not be exceeded and had been all imported. My Lords, the evidence as to the quota is very meagre, but I can find no evidence that it had necessarily to be delivered in 1917, and, on the other hand, we find, as I have already pointed out, that some of the hired vessels were starting on voyages which could not be completed until 1918, though it is not stated in respect of what quota such

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voyages were made, and I can see no grounds whatever for suggesting that by reason of the limitation of the quota there was any probability that the *Strathfillan* would under the circumstances have been at any time "infructuous," as suggested by Atkin L.J. I am therefore of opinion that the appeal should be allowed and the assessment of the Registrar restored. My Lords, I said during the hearing that I found a difficulty in understanding what the measure of damage was which the Court of Appeal had laid down by the formal judgment as it now stands; but if I understand the opinions of the majority of your Lordships correctly it is intended that the whole matter should be open in the inquiry before the Registrar on such evidence as may be adduced.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order of the Court of Appeal reversing an order of the President, by which he confirmed the report of the Registrar and Merchant assessing the amount of the damages to which the owners (the appellants) were entitled owing to the detention of their ship during the execution of repairs occasioned by a collision with a ship belonging to the respondents.

By the order of the Court of Appeal the report was referred back to the Registrar "for the purpose of assessing the amount of compensation due to the owners of the steamship *Strathfillan* for the loss to them for thirteen days of the use of the said vessel as a profit-earning vessel."

The Registrar and the learned President in effect allowed as an item of special damage the net cost of hiring other tonnage to take the place of the *Strathfillan* during the period of detention—which was fixed at thirteen days—and the real question is whether there was any evidence on which a finding that the said tonnage was in fact hired in consequence of the ship's detention could properly be arrived at.

The material facts are these:—

The collision occurred on August 5, 1917, and the repairs necessitated by it commenced on August 14, 1917, and were

completed by August 31. It is agreed that of this period thirteen days only are to be treated as lost by reason of the collision. The ship was out of service for a period of twenty-five days altogether, but the extra period of twelve days resulted from the execution by the owners of certain alterations voluntarily undertaken by them.

During the year 1917 abnormal conditions prevailed. The trade in lubricating oils in which the *Strathfillan* was engaged was controlled by the Government, and a limit was set on the quantity particular merchants were entitled to import. The quota allowed to the appellants for the year 1917 was 1,188,700 barrels. The Shipping Controller undertook to give them space in liners for 657,400 barrels, leaving them to find tonnage for the remaining 531,300 barrels. This they did, partly by means of ships of their own and partly by chartering other vessels. The *Strathfillan* was one of their own ships used for this purpose. The rate of hire fixed by the Controller was necessarily a very high one—namely, 230*s.* a ton per day deadweight capacity. The appellants' trade consisted in the importation and sale of their own oils and, inasmuch as, so far as they used their own vessels, the carriage was effected at the actual cost to them, which was much less than the costs of chartering other ships, it was to their advantage to use their own ships to their utmost capacity. But in the result, the transport they had to provide by chartering exceeded that provided by their own ships. In 1917 they chartered nine vessels, five before and four after the date of the collision. The first charter effected after that date was on October 9, 1917. The quota for the year 1917 was in fact imported. Whether this had to be effected and was effected within the calendar year or whether some latitude was allowed and a part was actually landed after the end of the year is left in doubt. Nor was any evidence given as to the quantity of oil remaining to make up the quota at the time the detention occurred.

Seeing that the entire period of detention was twenty-five days it is a little difficult to suppose that the appellants really went through the process of calculating how much

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extra tonnage would be necessitated by the thirteen days in question and fixed their hirings accordingly. In fact, I think, if the way the claim was launched and the evidence tendered in support of it are carefully considered, they did no such thing.

The appellants' claim was formulated in a document headed "Statement in support of loss by detention," printed in the Appendix at p. 8. In this document it is not alleged that any hirings, which would not otherwise have been effected, were necessitated by the detention of the *Strathfillan*, but the claim is obviously based on the theory that, inasmuch as to use their own ship was cheaper than to use hired tonnage, a proportionate part for the thirteen days of the tonnage actually hired under whatever circumstances should be assumed to be substituted for the *Strathfillan*, so that the extra expense might be treated as damages for loss of use of the vessel.

I now turn to the evidence given by Mr. Balsillie, the only material witness called by the appellants. In his examination in chief he says (p. 15A): "If any of our own vessels were delayed that increased the quantity of chartered tonnage that we had to get" and again, at the bottom of the same page, in answer to the question "Have you prepared your claim for detention on the basis of the cost to you of these chartered vessels?" he says, "Yes, what we paid others to do the work the *Strathfillan* would have done." In fact his evidence in chief is based on the theory on which to my mind the "statement" above referred to is based. It is in re-examination that the point now made is raised, and that by a leading question (p. 32D): "In consequence of not getting her to carry goods you had to charter at those high rates? (A.) Yes, we had to maintain it." He is then further cross-examined and I think the result of this is to make him fall back on the old theory that part of the chartered tonnage must necessarily be treated as substituted for the *Strathfillan*.

I am clearly of opinion that this evidence was not sufficient to establish the contentions that the appellant found it necessary to provide extra tonnage equivalent to thirteen

days' use of the *Strathfillan* and that in consequence of such necessity they did in fact provide it.

But this does not dispose of the question. Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the *Strathfillan* the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention.

Both the learned Lords Justices in the Court of Appeal expressed the view that not only did the circumstances proved fail to justify such an inference but that they actually negatived it. After the collision the *Strathfillan* made one round trip. There was no time to make another before the end of 1917 and there would not have been time even if the detention had not occurred. It is said that this conclusion was based upon an erroneous view of the meaning of the expression " the quota for " or " in " (both expressions are used) " 1917 " and that in fact the quota might have been completed by another voyage of the *Strathfillan* if she had not lost the thirteen days. All I can say is if there was any such misapprehension it was due to the way in which the case was presented to the tribunal. It is idle to say that the Registrar and Merchant had outside knowledge of their own on which they were entitled to act. The report contains no indication of their having possessed any such knowledge, all they say is that in consequence of the delay of the *Strathfillan and for other purposes* it was necessary to charter other vessels. Even therefore if they possessed and were entitled to act on outside knowledge—that they were so entitled I am not prepared to admit without further authority than the mere statements of counsel to that effect—there is no reason to suppose that such outside knowledge influenced their conclusion.

In my opinion the evidence before the tribunal was not sufficient to justify the inference in question, and the order of the Court of Appeal was right and ought to be affirmed and the appeal to this House ought to be dismissed with costs.

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But under that order the case is referred back to the Registrar for the purpose of assessing compensation for the loss to the appellants for thirteen days of the use of the vessel and it will be open to the appellants to give evidence of any circumstances which in their view tend to support their claim to be paid the extra cost of employing chartered tonnage. It is only in the absence of evidence enabling him to estimate the loss that the Registrar may have to fall back upon interest on capital value, as was done in the case of *The Susquehanna*. (1)

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 30, 1928.

Solicitors for the appellants: *Thomas Cooper & Co.*

Solicitors for the respondents: *Godfrey Warr & Co., for Batesons & Co., Liverpool.*

(1) [1926] A. C. 655.

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

FORTH CONSERVANCY BOARD . . RESPONDENTS.

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Revenue—Income Tax—Tolls—River Conservancy Board—Shipping Dues—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A, No. III., r.* 3.

Under Sch. A of the Income Tax Act, 1918, tax is to be charged on the property in all lands, tenements, hereditaments, and heritages in the United Kingdom. Rule 3 of Sch. A, No. III., provides the mode of estimating the annual value in the case of (inter alia) "canals, inland navigations . . . . rights of markets and fairs, tolls . . . . ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages."

A conservancy board was established by statute for the purpose of regulating and improving the navigation of a river and firth, and under its statutory powers it levied shipping dues upon all shipping entering the river and firth within its jurisdiction. It had no other source of income. Upon an appeal against assessments to income tax under Sch. A in respect of the surplus arising from the shipping dues so levied:—

Held, that the surplus was not a profit arising out of lands or heritages within Sch. A, and that the board was not assessable under that Schedule.

Decision of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland, affirming by a majority (the Lord President, Lord Blackburn, and Lord Ashmore; Lord Sands dissenting), the determination of the Commissioners for the General Purposes of the Income Tax for the district of Stirling, whereby assessments to income tax for the five years ended April 5, 1926, made upon the respondents under Sch. A in respect of balances arising from shipping dues levied by them under their statutory powers were discharged.

The facts are fully stated in the opinion of Lord Buckmaster.

* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, and LORD PHILLIMORE.

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1928. June 28, 29. *Sir Thomas Inskip A.-G.* and *MacRobert S.-G.* for Scotland (with them *Reginald Hills* (of the English Bar) and *A. N. Skelton* (of the Scottish Bar)), for the appellants. It is said that the words of r. 3 of Sch. A, No. III., are limited by the earlier words of the Schedule, and that as the respondent board have received no profits arising out of lands and heritages they are not liable to taxation under that Schedule. In the appellants' submission that which is properly described as a toll within the meaning of r. 3 is taxable though it is not necessarily a profit arising out of lands or heritages in the strict sense of the words. The use of the words "rights of markets and fairs, tolls and other concerns of the like nature" throws a light upon the meaning of the earlier words in Sch. A, and shows that tolls are regarded by the Legislature, for income tax purposes, as profits arising out of lands and heritages. Upon the authorities shipping dues are in the nature of tolls, and the profits arising therefrom are taxable under Sch. A; and not the less so because the profits are applied to public purposes: *Mersey Docks and Harbour Board* v. *Lucas* (1); *Attorney-General* v. *Black* (2); *Sowrey* v. *Harbour Moorings Commissioners of King's Lynn* (3); *Humber Conservancy Board* v. *Bater* (4); *Charing Cross Bridge Co.* v. *Mitchell* (5); *Rex* v. *Bell* (6); *Vauxhall Bridge Co.* v. *Sawyer*. (7) If it is necessary to say that these tolls must be connected with the ownership or occupation of land there is here a very real connection. The tolls are connected with the public duties of the board, and those duties are connected with the ownership of land.

[They also referred to *Baillie* v. *Hay* (8) and *Drughorn* v. *Moore*. (9)]

Graham Robertson K.C. and *T. M. Cooper K.C.* (with them *G. A. Montgomery*) (all of the Scottish Bar) for the respondents.

(1) (1883) 8 App. Cas. 891.
(2) (1871) L. R. 6 Ex. 78, 82; 308, 309, 310.
(3) (1887) 3 Times L. R. 516; 2 Tax Cas. 201.
(4) [1914] 3 K. B. 449.
(5) (1855) 4 E. & B. 549, 559, 562.
(6) (1816) 5 M. & S. 221.
(7) (1851) 6 Ex. 504.
(8) (1866) 4 M. 625, 629.
(9) [1924] A. C. 53.

The rules of No. III., Sch. A, are simply rules for the computation of something which must come within the initial description in Sch. A. Tolls may or may not be derived from land, and upon an examination of these particular tolls it cannot be said that they are lands or heritages. A toll has never been recognized as a heritable right like a ferry. Nor can it be said that they belong to any concern the profits of which arise from lands and hereditaments. These tolls are distinct in character from highway tolls. There is a distinction between a franchise which is connected with land and a franchise which only involves an obligation connected with land.

[They referred to *Adamson* v. *Clyde Navigation Trustees* (1); *Leith Dock Commissioners* v. *Miles* (2); *Burghead Harbour Co.* v. *George* (3); *Assessor for Lanarkshire* v. *Clyde Navigation Trustees* (4); *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (5); *In re Christmas* (6); *In re David* (7); *Attorney-General* v. *Jones.* (8)]

Sir Thomas Inskip A.-G. in reply referred to *Exeter Corporation* v. *Warren.* (9)

The House took time for consideration.

1928. Nov. 20. LORD BUCKMASTER. My Lords, the only question on this appeal is whether the respondents, the Forth Conservancy Board, have been lawfully assessed to income tax under Sch. A, No. III., r. 3, of the Income Tax Act, 1918. The Commissioners of Inland Revenue have deliberately elected to base their claim on this narrow foundation, and the matter for determination is whether the foundation is broad enough to support the claim.

The General Commissioners found that the respondents were not so assessable, and their Lordships of the first division dismissed the appeal to them against this decision. The

(1) (1863–5) 1 M. 974, 987; 3 M. (H. L.) 100.
(2) (1866) 4 M. (H. L.) 14, 18.
(3) (1906) 8 F. 982, 997.
(4) 1908 S. C. 620, 626.
(5) [1907] A. C. 264, 267–8.
(6) (1886) 33 Ch. D. 332, 346.
(7) (1889) 43 Ch. D. 27, 35.
(8) (1849) 1 Mac. & G. 574, 597.
(9) (1844) 5 Q. B. 773, 800.

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Commissioners of Inland Revenue have accordingly appealed to your Lordships' House.

The respondent board was constituted by The Forth Conservancy Confirmation Act, 1921, and by this Act there was transferred to them the undertaking of the Commissioners of the Forth Navigation constituted by the Forth Navigation Act, 1843. The main purpose of this Act was to improve the navigation of the river from Alloa to Stirling so as to facilitate vessels reaching and using the quay and harbour of the Royal Burgh of Stirling and by it power was given to levy rates and dues on ships, goods and passengers above the island of Alloa, such dues to be in lieu of the charges formerly made by the Provost, Magistrates and Town Council of Stirling. Powers were also given to purchase land, construct works and place lights and tugs within the limit of the Commissioners' jurisdiction.

The powers of the Commissioners were extended by the Forth Navigation Order Confirmation Act of 1903, and a new schedule of rates was provided. The provisions of this Act need no special examination. Under the Act of 1921, the limits of the original jurisdiction were extended down the river and more extensive powers were conferred upon the respondent board than those formerly possessed by the Commissioners. Power was given to purchase land, to construct works, to dredge the river, to alter and improve the channel, to make and maintain sea walls and embankments, to provide tugs, to acquire quarries for use in connection with the authorized work, and other similar matters, and authority was also conferred to levy rates and dues in respect of vessels entering and using the river and in respect of goods and passengers conveyed upon or shipped or unshipped within defined limits. An extended area of jurisdiction was conferred and within that area rates were authorized only upon vessels. The application of the revenue is unnecessary for the purposes of this appeal. It was in respect of the balances of income derived by the respondent board under these powers that assessments were made upon them under Sch. A. Sch. A provides that "Tax . . . .

shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof," and rules are laid down for estimating the annual value of the lands, etc., to be so charged.

Rules No. I. and No. II. are not important. It is under Rule No. III. that the difficulty arises. This is headed: "Rules for estimating the annual value of certain other Lands, Tenements, Hereditaments, or Heritages which are not to be charged according to the preceding General Rule," and sub-head 3 of that rule is in the following terms: "In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigation, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, the annual value shall be understood to be the profits of the preceding year."

The argument for the appellants is that according to the true interpretation of r. 3 there are to be included profits arising from property, most notably tolls, and ferries, which are not necessarily within the strict meaning of the words "property in lands, tenements, hereditaments or heritages," and that therefore the controlling words must be so extended as to cover this meaning and thereby to embrace the money arising from the dues and rates which the respondent board are entitled to levy.

I have omitted from consideration the other classes of property such as "streams of water, canals, etc.," since for the reasons given by the Lord President they are all easily capable of being made referable to property in lands and heritages and the word "tolls" is the one most favourable to the appellants.

Before, however, examining what is the nature of the property in respect of which the income to the respondent board arises, it is important to determine strictly the construction of the heading of Sch. A itself. It must be

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remembered that it is simply one schedule in a general taxing Act. It does not follow because property is not included under this rule that it is exempt from taxation. It may well be included under other rules, and there is no particular reason why an extended interpretation should be given to the illustration of properties subject to the charge contained in the third sub-head. Further, the rule itself shows that all the property included in sub-head 3 is assumed to be such examples of the enumerated items as have "profits arising out of lands, tenements, hereditaments and heritages," for otherwise there would be introduced into the middle of the rule a class of property outside the description of the special subject of taxation and contrary to the general words which embrace properties omitted from the specific enumeration but unite them together by the provision that they come within the declared objects of the tax. The primary and governing consideration of the Schedule is that taxes should be levied "in respect of the property in lands, tenements, hereditaments or heritages," and tolls may well arise in connection with such property, as, for example, in connection with a harbour. So also with regard to a ferry. If the landing stages on each side are owned, as in almost every case they would be, by the proprietor of the ferry, the income arising from the ferry would be properly referable to a property in the land, but if tolls or any other income arise from property not within the limitation imposed by the words of the Schedule itself they cannot be taxed under its provisions. In the present case, it is found that Stirling Harbour, which was transferred to the board, was practically derelict at the time of its transfer, and there is little prospect of its use for shipping, and, further, that with the exception of the Stirling Harbour, the respondents did not own any heritable subjects apart from a portion of the foreshore, purchased for possible future reclamation.

The sole revenues of the company arise from the shipping dues and the dues on passengers. Now these dues are not moneys arising from any of the property specified in Sch. A, and unless, therefore, a series of judicial decisions have

caused the interpretation of these words to be extended, on principle I think that the appellants must fail.

Turning now to the authorities, it is, I think, important to notice that in no case has the actual question arisen which arises here. In *Attorney-General* v. *Black* (1) the point was whether moneys accruing to the Improvement Commissioners of Brighton from a duty of 6*d.* on every chaldron of coal landed on the beach or brought into the town was liable to tax; the real defence being that it was in the nature of a district rate payable by the inhabitants. In the Court of Exchequer Kelly C.B. decided against the Commissioners on the general ground that the moneys received would be income in the hands of a private person and that neither its nature nor the purposes of its application took away the liability. Martin B. said he thought there was reason for contending that the tax was within Sch. A, but that it was unnecessary so to decide because of the wide words of Sch. D. In the Exchequer Chamber Byles J. said the impost was "in the nature of a toll within the 3rd rule of Sch. A, No. III.," but discussed the matter no further. Blackburn J. referred to both s. 60, Sch. A, and s. 100, Sch. D, and continued: "The words in this latter section are very extensive. My Brother Martin says 'It seems impossible that any net could be extended more widely,'" and at p. 310 he continues: "The mention of 'rights of markets and fairs' and 'tolls' in Sch. A, No. III., shows the intention of the legislature to include in the general sweeping words of Sch. D sources of income similar to these," and, as I read his judgment, it was under that Schedule that he thought the tax attached. The other judges gave brief judgments in which the point was not referred to. It is plain therefore that this case affords but slight assistance to the appellants.

Mersey Docks and Harbour Board v. *Lucas* (2) is again a case where the distinction between the Schedules was immaterial to the decision. It is true that among the sources of revenue there sought to be taxed were anchorage dues on vessels anchoring in the Mersey and rates payable by vessels entering the

(1) L. R. 6 Ex. 78; 308. (2) 8 App. Cas. 891.

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Mersey but not using the appellants' docks, and these are closely allied to the duties charged in the present case. The real point argued, however, was again the general question of liability to taxation, and for the Mersey Docks it was contended that their statutory obligation to appropriate their surplus moneys to purposes essential to their undertaking relieved them of liability. Lord Selborne refers to the fact that the tax was imposed by Sch. A upon "docks," but he nowhere considers separately the moneys arising from the sources that were not strictly speaking docks and considers only the question of the permitted deductions. Lord Blackburn distinguishes (p. 907) the property from that of a private dock company and then (p. 910) adds: "The question therefore is solely whether or no the sources which produce this revenue are among those which are enumerated (I care not whether in Sch. A or Sch. D) as those upon which the tax has been granted to Her Majesty." There was indeed no need to care, the point was immaterial to the decision.

In *Humber Conservancy Board* v. *Bater* (1) the board were lessees of the foreshore and the bed of the river, but possessed no docks or wharves; their duties included dredging, lighting and buoying, and towards these services they received under statute annual payments from four railway companies and the Aire and Calder Navigation. It was these sums that it was sought to tax. Scrutton J. held the tax was properly exigible; he thought they might be an Inland Navigation under Sch. A and concluded: "They come within either Sch. A or Sch. D; they cannot come under both; but I am inclined to think they come within Sch. A." It is unnecessary to decide whether the balance of the learned judge's judgment was rightly inclined, since the fact that the board were lessees of the foreshore sufficiently distinguishes that case from the present.

The cases under the Mortmain Act deal with a different subject-matter, but it is at least worthy of comment that in the case of *In re Christmas* (2) a bond, given by Harbour Commissioners who owned the piers, jetties and docks

(1) [1914] 3 K. B. 449, 457. (2) 33 Ch. D. 332.

belonging to the Haven of Great Yarmouth, covering the duties they were entitled to levy on ships leaving the haven or loading or unloading in the roads but excluding their actual real estate was held not to be an interest in or connected with or incident to the land owned by the Commissioners. The case also of *In re David* (1), where a mortgage of tolls on bridges was held to be an interest in land, is instructive as showing that tolls may be of two natures, one connected with land and one not, and this is further illustrated by the case of *Vauxhall Bridge Co.* v. *Sawyer* (2), where tolls over a bridge owned and built by the Bridge Company were held to be a tenement since, in the words of Pollock C.B. (at p. 508): "They are a profit or payment received by the company in respect of the user by passengers of their bridge and roads; they concern land, and are annexed to land, and are paid for and in respect of the user of land."

The Scotch cases like the English are not authorities upon the actual point, but the case of *Adamson* v. *Clyde Navigation Trustees* (3) is a clear decision that dues paid for navigation of the River Clyde to the Navigation trustees could not be subject to assessment to the poor rate as lands or heritages. This case was carried to this House by the Clyde Trustees, who appealed unsuccessfully against their assessment in respect of their occupation of docks and wharves leaving the other question untouched. The case of *Leith Dock Commissioners* v. *Miles* (4) really decided only the validity of an assessment in respect of lands, quays, harbours, docks, etc., and the real question once more was whether the purposes to which the receipts were applied exempted them from liability. In my opinion therefore the Court of Session were right when in the case of *Assessor for Lanarkshire* v. *Clyde Navigation Trustees* (5) they held that the principle laid down in *Adamson's* case had not been overruled in the House of Lords.

There is therefore nothing in any of the authorities on which reliance can be placed by the appellants, and in my

(1) 43 Ch. D. 27.
(2) 6 Ex. 504.
(3) 1 M. 974; 3 M. (H. L.) 100.
(4) 4 M. (H. L.) 14.
(5) 1908 S. C. 620.

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opinion the true construction of the statute is fatal to their appeal.

Lord Phillimore desires me to state that he concurs in the judgment which I have just read.

VISCOUNT DUNEDIN. My Lords, I concur.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 22, 1928.

Agent for the appellants: *Solicitor for England of Board of Inland Revenue, for Solicitor for Scotland of Board of Inland Revenue.*

Agents for the respondents: *Grahames & Co., for Laing & Motherwell, W.S., Edinburgh.*

[HOUSE OF LORDS.]

GOSSE MILLERD, LIMITED . . . . APPELLANTS; H. L. (E.)* 1928 Nov. 16.

AND

CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED . . . . . } RESPONDENTS.

THE CANADIAN HIGHLANDER.

Shipping—Bill of Lading—Delivery of Cargo in damaged Condition—Damage by Rain—Hatch Covers negligently left off during Repair of Vessel—"Act, neglect or default . . . . in the management of the ship"—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5, c. 22), *Schedule, Art. III., r.* 2; *Art. IV., r.* 2 (*a*).

A steamship with a cargo of tinplates on board carried under a bill of lading under the Carriage of Goods by Sea Act, 1924, sustained damage during the voyage which necessitated her being kept for some weeks in dock for repairs. While the repairs were being executed workmen had frequently to be in and out of the hold where the tinplates were stored, and the hatches in consequence were often left open. Owing to the negligence of the shipowner's servants the hatches were not protected when rain was falling, and the rain having penetrated the hold damaged the tinplates. In an action by the owners of the tinplates in respect of the damage so caused:—

Held, that the shipowners having failed properly and carefully to carry, keep and care for the tinplates, as required by Art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, the onus was on them to prove that they were protected from liability by Art. IV., r. 2 (*a*), and that the negligence in the management of the hatches was not negligence "in the management of the ship" within the meaning of that rule.

The meaning of "act, neglect or default in the management of the ship" in Art IV., r. 2 (*a*), discussed.

Decision of the Court of Appeal [1928] 1 K. B. 717 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Wright J. (2) so far as it related to the claim of the appellants.

The appellants sued the respondents for damages in respect of a consignment of tinplates shipped at Swansea on board the respondents' steamship *Canadian Highlander* under a bill

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, and LORD ATKIN.

(1) [1928] 1 K. B. 717. (2) [1927] 2 K. B. 432.

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of lading dated February 6, 1925, for carriage to Vancouver, British Columbia, and damaged by contact with fresh water in the course of the voyage.

The facts are stated in the report of the case before the Court of Appeal and in the opinion of the Lord Chancellor, and they are summarized in the headnote.

Wright J. was of opinion that the respondents had failed in the obligation imposed upon them by Art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried," and that they had not brought themselves within the protection afforded by Art. IV., r. 2 (*a*), which relieves the carrier from liability in respect of any act, neglect or default of his servants "in the navigation or in the management of the ship," and he awarded the appellants 5565*l.* damages.

The Court of Appeal, by a majority (Scrutton and Sargant L.JJ.; Greer L.J. dissenting), held that the negligence complained of was negligence "in the management of the ship" within the meaning of the exception in Art. IV., r. 2 (*a*), and set aside the judgment of the learned judge.

1928. July 23, 24, 26. *Jowitt K.C.* and *G. St. C. Pilcher* for the appellants. Art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, provides that "subject to the provisions of Art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." By Art. IV., r. 2, "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the . . . . servants of the carrier in the navigation or in the management of the ship." The question is what is the meaning of "act, neglect or default in the management of the ship"? These words must be so construed as not to nullify the effect of the obligations imposed upon the carrier by Art. III., r. 2. They constitute an exception to the operative part of the Act, and should receive a narrow meaning. In the appellants' submission, in order to come within these words the act,

neglect or default must take place in the course of some operation which is being performed either solely or primarily for the wellbeing or safety of the ship as a ship. This Act was passed as the result of the recommendations adopted by the International Conference on Maritime Law at Brussels as the basis of a convention for the unification of certain rules relating to bills of lading. Art. IV., r. 2 (*a*), does not materially differ from s. 3 of the Harter Act, an Act of Congress passed in 1893, and since the passing of that Act the provisions of that section have been commonly adopted in bills of lading in this country. It is therefore material to consider the authorities in this country on bills of lading since the passing of the Harter Act and the decisions of the United States on the construction of that Act. The result of the English and American cases is that the distinction to be drawn is one between want of care of cargo and want of care of ship indirectly affecting cargo. The words "act, neglect, or default" in the exception clause refer to the navigation as well as to the management of the ship, and "management" must be construed in connection with "navigation."

[They referred to Temperley's Carriage of Goods by Sea Act, 1924, 3rd ed., pp. 46–61; *The Ferro* (1); *The Glenochil* (2); *The Rodney* (3); *Rowson* v. *Atlantic Transport Co.* (4); *Hourani* v. *Harrison* (5); *The Renée Hyaffil* (6); *S.S. Lord (Owners)* v. *Newsum, Sons & Co.* (7); *Toyosaki Kissen Kaisha* v. *Société Les Affréteurs Reunis* (8); *Suzuki & Co.* v. *Beynon & Co.* (9); *Crass* v. *French State Railways* (10); *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular and Oriental Steam Navigation Co.* (11); *Foreman and Ellams* v. *Federal Steam Navigation Co.* (12); *Knott* v. *Botany Mills* (13); *The Germanic* (14); *The Jean Bart* (15);

(1) [1893] P. 38, 44, 46.
(2) [1896] P. 10, 14, 18.
(3) [1900] P. 112.
(4) [1903] 1 K. B. 114; [1903] 2 K. B. 666.
(5) (1927) 32 Com. Cas. 305.
(6) (1916) 32 Times L. R. 83; 660.
(7) [1920] 1 K. B. 846.
(8) (1922) 27 Com. Cas. 157.
(9) (1926) 42 Times L. R. 269.
(10) (1921) 6 Ll. L. Rep. 162.
(11) [1927] 2 K. B. 456.
(12) [1928] 2 K. B. 424.
(13) (1900) 179 U. S. 69.
(14) (1904) 196 U. S. 589.
(15) (1912) 197 Fed. 1002.

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The Jeannie (1) ; *Andean Trading Co.* v. *Pacific Steam Navigation Co.* (2) ; *The Samland* (3) ; *The Silvia* (4) ; *The Merida* (5) ; *American Sugar Refining Co.* v. *Rickinson & Sons & Co.* (6) ; *The Hudson* (7) ; *The Newport News* (8) ; *The Carisbrook.* (9)]

Upon the evidence the respondents have failed to discharge the obligations imposed upon them by Art. III., r. 2, and they have not brought themselves within the exception contained in Art. IV., r. 2 (*a*).

Raeburn K.C. and *Sir Robert Aske* for the respondents. Where the shipowner has supplied all proper appliances in accordance with the requirements of Art. III., r. 1, Art. IV., r. 2 (*a*), exempts him from liability for any misuse by the crew of those appliances which may result either directly or indirectly in damage to the cargo. Hatches are something with which the vessel is equipped for the purpose of protecting her and her cargo from the inroad of sea and of rain, and the neglect of those on board to replace the hatches when they ought to be replaced, with the result that the cargo is damaged by rain, is neglect in the management of the ship within the meaning of Art. IV., r. 2 (*a*). Negligence in dealing with an essential part of the ship is negligence in the management of the ship, and not the less so because the management is primarily for the benefit of the cargo. There is no essential difference between the neglect complained of in this case and the neglect held in *The Glenochil* (10), in *The Rodney* (11), and in *The Touraine* (12) to be neglect in the management of the ship. Again in *Rowson* v. *Atlantic Transport Co.* (13), which was a decision under the Harter Act, it was held by Kennedy J. and by the Court of Appeal that mismanagement of the refrigerating apparatus, which caused damage to a cargo of butter, was mismanagement

(1) (1916) 236 Fed. 463.
(2) (1920) 263 Fed. 559.
(3) (1927) 7 Fed. (2nd series) 155.
(4) (1898) 171 U. S. 462.
(5) (1901) 107 Fed. 146.
(6) (1903) 124 Fed. 188.
(7) (1909) 172 Fed. 1005.
(8) (1916) 199 Fed. 968.
(9) (1918) 247 Fed. 583.
(10) [1896] P. 10.
(11) [1900] P. 112.
(12) [1928] P. 58.
(13) [1903] 1 K. B. 114 ; [1903] 2 K. B. 666.

of the ship; but Vaughan Williams L.J. stated that the words "in the management of the said vessel" meant "in the management of the vessel qua vessel," and he based his judgment on the fact that the refrigerating machine was introduced, not for the purpose of a particular cargo, but for the purpose of cooling the ship's provisions. It is submitted that there is no substance in the distinction and that the wider language of Kennedy J. is to be preferred. The notion that the question is to be regarded irrespective of the existence of the cargo is unsound. The Act deals with ships only as cargo-carrying vessels and "management of the ship" means management qua a cargo-carrying ship. It is conceded that the misuse of the ship's appliances does not affect the shipowner's liability for careless stowage (*The Ferro* (1)), or for failure to watch the cargo for the prevention of theft (*Hourani* v. *Harrison* (2)). As to the United States authorities, it is only necessary to deal with the Supreme Court decisions, because the inferior Courts have merely endeavoured to apply the principles there laid down. In *The Silvia* (3) Gray J., giving the judgment of the Supreme Court, while declining to give any comprehensive definition of the words "navigation" and "management" of a vessel in the Harter Act, said: "They might not include stowage of cargo not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the sea." *Knott* v. *Botany Mills* (4) was a case of negligent stowage. *The Germanic* (5), where owing to the negligent unloading of an ice-coated ship, she became unstable and sank and her cargo was damaged, creates more difficulty. It was there held that the shipowner was not protected by s. 3 of the Harter Act. Holmes J., in delivering the judgment of the Court, said that if the primary purpose of the act complained of was not to affect the ballast of the ship, but

(1) [1893] P. 38.
(2) 32 Com. Cas. 305.
(3) 171 U. S. 462.
(4) 179 U. S. 69.
(5) 196 U. S. 589.

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to get the cargo ashore, the fact that it also affected the trim of the vessel did not make it the less a fault of the class which the first section removed from the operation of the third. That in which the fault was shown was not the management of the ship but unloading cargo. As Scrutton L.J. says in his book on Charterparties and Bills of Lading, 12th ed., p. 275, note 4, the authorities are not in a very satisfactory condition. No clear judicial interpretation of the term " management of the ship " is to be found either in the English or in the American cases. But in any event American authorities on an Act framed in different language afford no guide to the construction of the Act of 1924. The United States were parties to the convention as a consequence of which the Act of 1924 was passed, but they have not yet legislated. Scrutton L.J.'s judgment sums up the respondents' argument.

Jowitt K.C. replied.

The House took time for consideration.

1928. Nov. 16. LORD HAILSHAM L.C. My Lords, this is an action brought by the appellants against the respondents, claiming damages for injury done to their tinplates on a voyage from Swansea to Vancouver in a ship belonging to the respondents and known as the *Canadian Highlander*.

At the trial there was a great conflict as to the cause of the damage to the tinplates ; but on the hearing before the Court of Appeal and at your Lordships' bar, both sides accepted the findings of fact of the learned trial judge ; and it is therefore convenient to state these findings at once in order to formulate the questions of law which are raised in the appeal.

Under a bill of lading dated February 6, 1925, 5808 boxes of tinplates belonging to the appellants were shipped at Swansea for carriage to Vancouver by the *Canadian Highlander*. The whole of these tinplates were stowed in No. 5 lower hold, which is the aftermost hold in the ship. After loading these tinplates the *Canadian Highlander* proceeded to Liverpool in order to discharge inward cargo and to load

further outward cargo. On February 9 certain lumber, forming part of the inward cargo, was unloaded from the No. 5 'tween decks at Liverpool. During the discharge of this lumber through the hatchway of No. 5 hold there was heavy rain. On February 10, whilst undocking, the *Canadian Highlander* collided with a pier and damaged her stern. As a result, it became necessary to dry-dock the vessel and to do extensive repairs. During the course of the repairs it was discovered that the tail shaft liner was cracked and it became necessary to remove the tail shaft in order that a new liner might be fitted to it; for this purpose it was necessary to shift some of the cargo in the No. 4 hold and to remove the tail shaft liner through a door leading from the tunnel recess into No. 5 hold. The repairs continued until April 4, when the *Canadian Highlander* was undocked and proceeded to Glasgow, and thence to Vancouver, where she arrived on May 17. On her arrival it was found that the appellants' tinplates had sustained serious damage by fresh water. The learned judge came to the conclusion that during the vessel's stay in dry dock there was carelessness in moving and replacing the tarpaulins which were supposed to cover the No. 5 hold when work was being done there, and that in consequence rain got into the No. 5 hold and did the damage; and that probably there was also carelessness with regard to the use of the tarpaulins on February 9 when the lumber was being unloaded and that on that occasion also some rain was admitted. The learned judge seems to have acquitted the ship's officers of any lack of care, and there was no evidence to enable him to decide who were the persons responsible for the negligence which occasioned the damage. From time to time the hold seems to have been entered by the stevedores' men, by members of the crew, by surveyors, and by the men employed by the repairers; and it is easy to understand that one or more of these persons may not have been sufficiently scrupulous in replacing the tarpaulins on their entrance to, or exit from, the hold, or in preventing the water which had accumulated on the tarpaulins from finding its way into the hold.

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The appellants relied on r. 2 of Art. III. of the rules relating to bills of lading contained in the Schedule of the Carriage of Goods at Sea Act, 1924, which enacts as follows: "Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." It was not suggested on either side that there were any provisions in the bill of lading material to be considered apart from the articles contained in the statute; but the respondents relied upon r. 2 (*a*) of Art. IV.; this rule provides that: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

From the statement of the facts as found by the learned judge it could not be disputed that the respondents had failed properly and carefully to carry, keep and care for the goods carried. But the respondents pointed out that the obligation imposed upon them was expressly made subject to the provisions of Art. IV., and they claimed that the loss or damage complained of resulted from the act, neglect or default of their servants in the management of the ship. The argument at the bar turned mainly upon the meaning to be placed upon the expression "management of the ship" in that rule. The words in question first appear in an English statute in the Act now being considered; but nevertheless they have a long judicial history in this country. The same words are to be found in the well known Harter Act of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the Courts in this country. I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

In the year 1893, in the case of *The Ferro* (1), certain oranges had been damaged by the negligent stowage of the stevedore. It was held by the Divisional Court that the negligent stowage of the cargo was not neglect or default in the management of the ship. Gorell Barnes J. says: "I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.'" Sir Francis Jeune says: "It would be an improper use of language to include all stowage in such a term" (i.e., "mismanagement of the ship"). "It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is defined as something affecting the safe sailing of the ship . . . . it is easy to see that there might be things which it would be impossible to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation."

In the case of *The Glenochil* (2) the same two learned judges, sitting as a Divisional Court, held that the words did protect the shipowner for damage done by pumping water into the ballast tank in order to stiffen the ship without ascertaining that a pipe had become broken, and thereby let the water into the cargo. Gorell Barnes J. says: "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of

(1) [1893] P. 38, 44, 46.

(2) [1896] P. 10, 15, 16, 19.

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the said vessel.'" Sir Francis Jeune says: "It seems to me clear that the word 'management' goes somewhat beyond —perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself." And referring to his own judgment in *The Ferro*, he says: "It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo."

The principles enunciated in this case have repeatedly been cited since with approval in this country and in America. The same two learned judges applied them in the case of *The Rodney* (1), and they were accepted by the Court of Appeal in the case of *Rowson* v. *Atlantic Transport Co.* (2) In that case the Court of Appeal held that carelessness in handling the refrigerating apparatus of the vessel, resulting in damage to the cargo, must be regarded as falling within the expression, on the ground that the refrigerating apparatus was used for the ship's provisions as well as for the cargo, and therefore that negligence in managing it was negligence in management of the ship.

My Lords, I do not think it necessary or desirable to discuss whether the Court of Appeal was right in their application of the principle in that particular case for reasons which will appear later; I refer to the judgment only because it accepted as the basis of the decision the construction which had been placed upon the words in the case of *The Glenochil.* (3) In the case of *Hourani* v. *Harrison* (4) the Court of Appeal had to consider the meaning to be attached to the words of Art. IV., r. 2, in a case in which loss was caused by the pilfering of the stevedore's men whilst the ship was being discharged. The Court held that this did not fall within the expression "management of the ship"; but both

(1) [1900] P. 112.
(2) [1903] 2 K. B. 666.
(3) [1896] P. 10, 15, 16, 19.
(4) 32 Com. Cas. 305, 313, 319.

Bankes L.J. and Atkin L.J. (as he then was) discussed the meaning to be placed on the expression. Bankes L.J. reviews the authorities both in this country and in the United States; he points out that the principle laid down in *The Glenochil* (1) has been accepted in the Supreme Court of the United States as being correct, and he adopts and applies that principle to the case which he is then considering. The learned judge expresses the distinction as being between "damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself." Atkin L.J. says: "that there is a clear distinction drawn between goods and ship; and when they talk of the word 'ship,' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea."

My Lords, in my judgment, the principle laid down in *The Glenochil* (1) and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in the *Hourani* case (2) under the present English statute, is the correct one to apply. Necessarily, there may be cases on the border-line, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion. I expressly refrain from a discussion of the cases of carelessness in handling refrigerating apparatus. Your Lordships were informed that that question is directly involved in a case under appeal to the Court of Appeal, which may ultimately reach your Lordships' House, and the matter is one of such general importance that it is better that it should be specifically dealt with when it arises for decision rather than in a case in which it can only be introduced by way of illustration.

(1) [1896] P. 10. (2) 32 Com. Cas. 305.

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My Lords, it appears to me plain that if the test which I have extracted from the earlier cases is the correct one, it follows that the appellants are entitled to recover in the present case. It is clear that the tinplates were not safely and properly cared for or carried ; and it is for the respondents then to prove that they are protected from liability by the provisions of Art. IV., and that the damage was occasioned through the neglect or default of their servants in the management of the ship. In my judgment they have not even shown that the persons who were negligent *were* their servants ; but even if it can be assumed that the negligence in dealing with the tarpaulins was by members of the crew, such negligence was not negligence in the management of the ship, and therefore is not negligence with regard to which Art. IV., r. 2 (*a*), affords any protection. It follows that the judgment of the majority of the Court of Appeal was wrong, that the appeal must be allowed with costs here and below, and that the judgment of the trial judge must be restored ; I move your Lordships accordingly.

My Lords, I am asked by my noble friend Lord Atkin to say that he concurs in the judgment which I have just delivered.

VISCOUNT SUMNER. My Lords, I agree. As the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventible and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under Art. III., r. 2, of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within Art. IV., r. 2, so as to obtain the relief for which it provides.

The trial judge's finding is not very explicitly given and the evidence as to the precise way in which the damage occurred is not explicit at all, but I accept the view, on which the Court of Appeal proceeded, that the fresh water, which wetted and damaged the tinplates, got through the hatch of No. 5 hold into the shelter-deck and thence reached the lower hold ; that it did so, because from time to time during the various operations one or more sections of that hatch

had to be raised to permit egress and ingress for men, some of whom were in the shipowner's employment and some not, who had to go below for those purposes, and because the ship's tarpaulins, which ought to have been placed, replaced and kept in the proper position, so as to exclude the rain, were not so used by reason of neglect on the part of the ship's officers or some of them in the oversight of what was going on. It is not known exactly how the rain was suffered to enter or in what exact respect the handling and arrangement of the tarpaulins was insufficient, but it is assumed that more vigilant supervision would have prevented any material admission of the rain. What fell, while timber cargo was being discharged, is admitted to have been small in quantity and almost negligible in its effect and, although the rainfall was more copious while the ship was in dry dock, no one can estimate its quantity or discriminate between damage when the 'tweendecks were being chipped, caulked and painted and damage when the lower hold was being entered for various purposes. We, accordingly, approach the question, whether this default on the officers' part was or was not default in the management of the ship, without being able to distinguish the relative importance to the case in this connection of discharging cargo, of painting and caulking 'tweendecks, both being operations carried out by the crew, and of repairs and renewals to machinery and hull carried out by ship-repairers.

In the Court of Appeal Scrutton and Sargant L.JJ. agreed that the exception of default in the management of the ship protected the shipowner in these circumstances, but on very different grounds. The former says: "Assuming that the words deal with the management of the ship as a physical entity, and not management of the cargo-carrying adventure on which the shipowner and cargo owner have agreed to use the ship, here what has been managed is the hatches of No. 5 hold, an essential physical part of the ship. I cannot understand why, on the words themselves, there is not negligence in the management of the ship or a substantial physical part of the ship." Sargant L.J., without agreeing that there is

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necessarily management of the ship so long as a physical part of the vessel is affected, says that the expression covers: "Operations with regard to the ship, as a whole and for ship's purposes and not merely in relation to cargo . . . . though the result may be limited to cargo and not injure the ship at all. . . . . Here the operations were for repair of damage and scraping and painting and had nothing at all to do with care of cargo . . . . . The primary or sole purpose of the operations, in which the negligence occurred, concerned the ship as a whole."

My Lords, for the following reasons I am unable to accept either of their views. I concur in the judgment of Greer L.J. The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption. If management of the ship includes any part of the ship or any operation with regard to the ship as a whole, which is carried out for ship's purposes and not merely in relation to cargo, I think that the shipowner's position would be certainly no less favourable than it was before under voluntary bills of lading and probably more so; for on this construction the obligation of Art. III., r. 2, to take care of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect, and to my mind they are not.

When the Legislature gave effect in 1924 to the labours of the International Conferences on Maritime Law of 1922 and 1923, it must be taken to have been aware of the English

decisions, which from *The Ferro* (1) in 1893 onwards had construed the words reproduced in Art. IV., r. 2, and as that line of decision had covered some thirty years and the clause had remained in general use in bills of lading I think it must be taken that the Legislature intended to confirm the construction thus judicially arrived at, except in so far as, by introducing variations in the language used, it clearly made a change. Of foreign decisions of course the Legislature is not deemed to take notice and, although the Conference was doubtless well acquainted with the United States cases, it has not yet been held that the Legislature of this country is deemed to know, what those, whose reports or conventions it affirms, have been familiar with. Prima facie therefore the interpretation of the words in question, which had been laid down in the English decisions before 1924, had the approval of the Legislature and is not to be doubted. Now *The Ferro* (1) had decided that negligent stowage was not neglect in the management of the ship, and the succeeding cases had brought acts, which certainly seem to strain the word "management" to the utmost, within the scope of the clause simply because they were done for the safety of the ship herself, regarded as a ship and not as a cargo carrier, and were not done primarily in the interest of some particular cargo. It seems to me that the view of Scrutton L.J. involves a dissent from these decisions, and he expressly says of United States cases, which follow the same line, that he would have decided several of them otherwise. I do not think this is competent, unless the language or the structure of the new legislation clearly departs from the words of the old clauses. By forbearing to define "management of the ship," though "ship" is specially defined with reference to the function of carrying cargo (Art. I.), and by making the obligation of care in Art. III., r. 2, expressly subject to the provisions of Art. IV., the Legislature has, in my opinion, shown a clear intention to continue and enforce the old clause as it was previously understood and regularly construed by the Courts of law.

(1) [1893] P. 38.

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If one examines the language of the Article apart from any previous decisions, I think one fails to find in it words to support the view of Scrutton L.J. The ship is the subject both of navigation and of management, and this lends little support to the construction, that management of any part of a ship will satisfy the words. It is the whole ship that is navigated and not any part of it, even though the neglect or default may directly operate upon only a particular part of the ship or its equipment. Why should it be otherwise with management, or why in the case of management is the clause to be read as "of the ship or any part thereof," but in the case of navigation to be read simply as it is expressed? In neither case is it material to know what the thing negligently dealt with may be, provided the operation, in which the neglect occurs, is either "navigation" or "management" but in both cases alike "of the ship." The words "of the ship" are otiose if it is the negligent navigation or management alone that matters. If any effect is to be given to them, they qualify and define the navigation and the management referred to, and do so in each case in the same way. If the navigation is of the entire ship, so must the management be. Of course in both cases alike some one and perhaps very subordinate part of the ship or its equipment may be the object, which is immediately dealt with negligently, but neglect in regard to that object must still be neglect in the management of the ship, if it is to avail the shipowner as a defence.

In adopting this view of the words of the Act and of their correspondence with the construction put upon the old bill of lading clause from *The Ferro* (1) to *Rowson* v. *Atlantic Transport Co.* (2) I am fortified by the weighty judgments of the Court of Appeal in *Hourani* v. *Harrison* (3) and by a series of recent decisions in the High Court. I think it is of importance to notice how uniformly since 1893 the English Courts have interpreted the decisions down to and including *Rowson's* case (2) in the sense I have ventured to suggest,

(1) [1893] P. 38. (2) [1903] 1 K. B. 114; [1903] 2 K. B. 666.
(3) 32 Com. Cas. 305.

and how generally a similar interpretation of similar words has been adopted in the United States. Hardly anywhere, and nowhere with real authority, has Scrutton L.J.'s construction been laid down. So uniform a current of decision can only be departed from now upon the clearest grounds. The respondents' counsel laid great stress in argument on the language used in *Rowson's* case (1), especially by Kennedy J. and by Vaughan Williams L.J., and on some differences between the English decisions and those in the United States, notably between *The Glenochil* (2) on the one side and *Knott* v. *Botany Mills* (3) and *The Germanic* (4) on the other. These seem to me to be differences in the wording of the reasons given but not in the principle or in the view taken of the particular facts, to which the claim is applied. No one can profess that the language used in the different judgments has been uniformly happy. No one can deny that wide differences of view may well be taken of the matters of fact, which arise in this class of case, even though between them there is a strong similarity. The management of the ship "as a ship" or "qua" ship or "quoad" ship, and "primary object" and "secondary bearing" are expressions, of which I may be perhaps allowed to speak with cold acquiescence without presuming to better them, and as for the facts it is never wise to try to decide case B because the part of the ship mishandled is "like" the part mishandled in case A. In *Knotts'* case (3) the cargo should never have been so stowed that, if the ship got down by the head for a short time, the sugar would wet the wool, nor should the cargo in *The Germanic* (4) have been discharged, regardless of compensatory adjustment, so as to upset the previous stability of the ship and damage the cargo. Both cases follow *The Ferro.* (5) As for *Rowson's* case (1) I do not think the expressions relied on really differ from those of Sir Francis Jeune and Barnes J., nor, as it seems to me, did the learned judges think they were differing from their predecessors. As to the facts of that

(1) [1903] 1 K. B. 114; [1903] 2 K. B. 666.
(2) [1896] P. 10.
(3) 179 U. S. 69.
(4) 196 U. S. 589.
(5) [1893] P. 38.

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case and the way in which the Court of Appeal regarded them I am quite willing to defer any observations till an opportunity arises of considering refrigerating machinery as a whole, though the view I have formed of the general meaning of the clause must, so far as I am concerned, remain.

The view of Sargant L.J. seems to me to have been based on a misunderstanding of the facts. Because the operations were repairing damage and scraping and painting 'tween decks and so had nothing to do with the cargo, he considered that the neglect or default occurred in the management of the ship as a whole, though incidentally it was the cargo that suffered by them. This is not how Wright J. regarded the case nor in my opinion do the facts bear it out, but, as far as the interpretation of the clause goes, the learned Lord Justice accepts the current of authority and not the construction of Scrutton L.J. What did the damage was misuse of the tarpaulins. Now the tarpaulins were used to protect the cargo. They were put over the hatch, as they always are, to keep water out of cargo holds. They should have been so arranged, when the hatch boards were taken off, as to prevent water from getting to the cargo. It was not a question of letting light into the 'tween decks. They were lit by electricity. There is no evidence that an amount o water entered that would have done any harm to an empty hold or to the ship as a ship. Water, sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics, might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpaulin, which was neglected, was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or scraping the 'tween decks.

I would add one thing more. Even if the contention was right in fact, it does not cover the damage done by the admission of rain water, while the hatches were off

solely for the purpose of discharging cargo. Wright J. seems to have found, though not with much confidence, that some damage was done then. He did not say how much, for the evidence did not enable him to do so. It is true that counsel for the appellants admitted, and the Court of Appeal thought, that it was much less than the damage done afterwards, but unless it be held that negligence merely in discharging cargo is negligence in the management of the ship, it is incumbent on the shipowner, on whom the whole burden of proving this defence falls, to show how much damage was done in the subsequent operations, because it is only in respect of them that he can claim protection. This he has failed to do, and in consequence he has failed to show to what extent in money his prima facie liability for the whole damage ought to be reduced.

Order of the Court of Appeal reversed and judgment of Wright J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Nov. 16, 1928.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Botterell & Roche.*

[PRIVY COUNCIL.]

J. C.* 1928 Nov. 13.

In re PAYMENT OF COMPENSATION TO CIVIL SERVANTS UNDER ART. 10 OF AGREEMENT FOR A TREATY BETWEEN GREAT BRITAIN AND IRELAND.

SPECIAL REFERENCE.

Privy Council Practice—Rehearing—Power to review previous Decision—Special Reference—Compensation payable to Civil Servants.

The result of decisions of the Judicial Committee is: (1.) that there is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a right of property is involved; and (2.) that such an indulgence will be granted in very exceptional circumstances only.

Upon an appeal in an action brought in Ireland by two civil servants transferred to the Government of the Irish Free State as to the compensation to which upon their retirement they were entitled under art. 10 of an agreement for a treaty between Great Britain and Ireland, the Judicial Committee in *Wigg* v. *Attorney-General for the Irish Free State* [1927] A. C. 674 determined in favour of the plaintiffs certain questions as to the amount so payable; an Order in Council was made in accordance with the judgment. Subsequently it appeared that the date of the transfer of the plaintiffs had been wrongly stated in the judgment, and it was contended that the error vitiated the decision. In consequence questions as to the compensation payable under the article were referred to the Judicial Committee under s. 4 of the Judicial Committee Act, 1833:—

Held, that it was competent to the Judicial Committee upon the reference to give a decision differing from that pronounced upon the appeal above mentioned, but that upon the true construction of art. 10 the decision then given was correct.

MATTER specially referred to the Judicial Committee under s. 4 of the Judicial Committee Act, 1833.

The reference was of certain questions relating to the payment of compensation to civil servants under art. 10 of the articles of agreement for a treaty between Great Britain and Ireland.

The circumstances in which the matter was so referred, the terms of art. 10, and the other material facts appear from the report of the Judicial Committee.

* *Present:* MARQUESS OF READING, LORD PHILLIMORE, LORD HANWORTH, LORD ALNESS, and CHIEF JUSTICE ANGLIN.

1928. July 23, 24, 26, 27. *Dickie K.C.*, *James Henry K.C.* and (*Miss*) *A. K. Deverell* for the Transferred Officers Protection Association.

Overend K.C., *Bewley K.C.* and *T. A. Finlay* for the Government of the Irish Free State.

Sir Thomas Inskip A.-G., *Sir Boyd Merriman S.-G.* and *Giveen* for the British Government.

Nov. 13. The report of their Lordships was delivered by

THE MARQUESS OF READING. This matter was referred to the Judicial Committee by an order of His Majesty in Council made under s. 4 of the Judicial Committee Act, 1833.

The questions in issue relate to the principles applicable to the determination of the compensation payable to those civil servants in the service of the Crown who were transferred to the Irish Free State after March 20, 1922, and were discharged or have retired in consequence of the change of Government, effected by the establishment of the Government of the Irish Free State in pursuance of the articles of agreement for a treaty made between Great Britain and Ireland. The amount of the compensation payable was determined by the Government of the Irish Free State in accordance with the principles laid down in certain minutes of the British Treasury, and in particular the minute of March 20, 1922. The question referred to their Lordships is whether the payment of compensation so determined in respect of civil servants or other officials or public servants transferred to the service of the Provisional Government or of the Government of the Irish Free State after March 20, 1922, is a payment of compensation within the meaning and true intent of art. 10 of the articles of agreement.

Art. 10 is as follows: "The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of the police forces and other public servants who are discharged or who retire in consequence of the change of Government effected in pursuance hereof.

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The Act of 1920 referred to is the Government of Ireland Act, 1920.

The arguments before their Lordships covered a wide range, and raised some problems difficult of solution which lay on the fringe of the question referred but which fortunately it is not necessary for their Lordships to solve.

Before proceeding to deal with the arguments at the hearing before the Board it is desirable to pass in brief review the facts and circumstances which have led to the present dispute.

In the year 1920 it was contemplated that changes should be made in the government and administration of Ireland, and accordingly the Government of Ireland Act, 1920, was passed. Power was given to establish Parliaments in Southern and Northern Ireland and executive authority within the limits reserved by the Act. It was further provided by s. 55 that existing Irish officers in the service of the Crown should continue to serve in Ireland and in the new Governments to be formed, and should hold their offices upon the same tenure and the same conditions as hitherto. In order to protect those officers who might be removed from office or might wish to retire in consequence of the change to be effected in the government of Ireland, provision was made for payment to them of compensation to be calculated in like manner as the superannuation allowances or gratuities had been applicable to them, with certain additional concessions, on the terms and conditions contained in the eighth schedule of the Act and the rules thereunder.

Under these provisions an officer an in established capacity in the service of the Crown who wished to retire under the statutory conditions would receive as compensation under this Act an annual allowance or pension calculated in like manner as the superannuation allowance he would be qualified to receive under the Superannuation Acts, 1834 to 1914, if he retired on the ground of ill-health, supplemented for the purpose of that calculation by certain additional years of service and certain notional increments of salary.

The annual allowance or pension payable under the Superannuation Acts, 1834–1914, to a civil servant who retires on the ground of ill-health after not less than ten years' service is one-sixtieth of the salary and emoluments of his office at the date of his retirement for each year of service. A new system was introduced under the Superannuation Act of 1909 for the benefit of those officers who elected to avail themselves of it. They became entitled to an annual allowance calculated upon one-eightieth instead of one-sixtieth per year of service, and in addition to a lump sum payment of one-thirtieth of the salary and emoluments for each year of service, such payment not to exceed one and a half times the amount of the salary and emoluments. During the war the remuneration was increased by what was termed a bonus. At first no part of the bonus was included for the purpose of the calculation of these allowances, but gradually it was recognized by the Treasury and particularly by the minute of March 20, 1922, that the bonus had become a regular part of the civil servants' remuneration, and that it should be taken into account in computing the retiring allowances. The bonus is not a fixed sum like the salary, but is variable and is calculated on a sliding scale by reference to the official index figure of the cost of living.

The scheme of Government under the Act of 1920 was superseded in December, 1921, by the articles of agreement for a treaty between Great Britain and Ireland, which by art. 17 provided for a provisional arrangement for the administration of Southern Ireland during the transitional period, pending the constitution of a Government of the Irish Free State. By the Irish Free State (Agreement) Act, 1922, passed on March 31, 1922, force of law was given to these articles, and provisions were made for carrying the treaty into effect. In pursuance of this Act an Order in Council of April 1, 1922, was issued transferring the functions in connection with the administration of public services in Southern Ireland to the Provisional Government; in December, 1922, the Irish Free State was established, and the Constitution was enacted by Act No. I. of the Dail

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Eireann. Art. 77 of the Constitution (first schedule to the Act) provides that every existing officer (subject to the exception therein mentioned) of the Provisional Government at the date of the coming into operation of this Constitution "shall on that date be transferred to and become an officer of the Irish Free State . . . . and shall hold office by a tenure corresponding to his previous tenure." By art. 78 "every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of art. 10 of the Scheduled Treaty." This statute made the articles of the treaty part of the municipal law of the Irish Free State. In consequence of these enactments existing Irish officers transferred to the Provisional Government, and later to the Irish Free State, became entitled by Irish Free State law to the benefit of art. 10 of the treaty.

The compensation payable by the Irish Free State Government to those officers who were discharged by the Government or who retired because of the change of Government effected in pursuance of the articles for the treaty, and who came within the provisions of art. 10, was assessed by the Minister of Finance of the Irish Free State assisted by a committee carefully selected for this purpose. It is not disputed that the Minister of Finance assessed the compensation in accordance with the principles set forth in the minutes of the British Treasury, including the minute of March 20, 1922, but the civil servants were dissatisfied with a part of the award and claimed that the compensation so determined was not fair compensation within the meaning of art. 10. They raised objections to the award in respect of (inter alia) the following two matters:—

(1.) In regard to the portion of the annual allowance which is computed on the bonus, as distinguished from the fixed salary, it was made a condition of the award that this portion should be adjusted quarterly by reference to the official figure of cost of living, and should be reduced according to the sliding scale when the cost of living figure fell, but that it should not be increased beyond the amount ascertained

at the date of retirement if the cost of living figure rose. This principle is known as the overriding maximum.

(2.) In regard to that portion of the lump sum payment which is computed on the bonus, the award was based upon 75 per cent., and not upon the whole of the bonus payable for the quarter preceding the date of retirement.

The meaning and intent of art. 10 and the principles upon which the compensation payable under it should be assessed, including the principles relating to the overriding maximum and the 75 per cent. above mentioned, were considered by the Judicial Committee on the hearing of the appeal in the case of *Wigg* v. *Attorney-General for the Irish Free State.* (1) The plaintiffs in the action were two civil servants who sought to enforce their claims under art. 10 in the Courts of the Irish Free State. In expressing their opinion allowing the appeal in favour of the two civil servants, the Board, when referring to the effect of the minute of March 20, 1922, upon the claims, assumed that these officers had at the date of the minute been transferred to the Government of the Free State, and held that the minute could not affect their rights. These officers were, in fact, not transferred to the Government of the Irish Free State until after the date of this minute, and it was contended that the advice tendered to His Majesty was tainted, if not vitiated, by this error of fact. It is because of this misapprehension by the previous Board (its effect upon the decision will be considered later) that the present reference was ordered.

At the outset of the hearing in this reference, Mr. Dickie, who attended their Lordships on behalf of the Council of the Transferred Officers Protection Association, argued that the Board is bound in law, and without examination, to follow the decision in the appeal in *Wigg's* case (1), whether they considered it to be right or wrong. He maintained that if it was wrong, nothing short of an Act of Parliament could rectify it. Their Lordships are unable to hold that this proposition stated in such an extreme form is established. It may well be that the Board would hesitate long before

(1) [1927] A. C. 674.

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disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination; but for the proposition that the Board is, in all circumstances, bound to follow a previous decision, as it were, blindfold, they are unable to discover any adequate authority. In other words, no inflexible rule, which falls in all circumstances to be applied, has been laid down.

Mr. Dickie based his argument mainly upon cases in which one of the parties to a suit which had been decided against him, or a person who was not a party to the suit, applied for a rehearing of it. Their Lordships must however point out, in considering these cases, that they have no direct application to the matter before the Board, as this reference is not a rehearing of the claims in *Wigg's* case. Now there can be no doubt that, in the early cases, a rigid standard was applied to the competency of a rehearing. Thus, in *Rajundernarain Rae* v. *Bijai Govind Sing* (1) Lord Brougham, in delivering the opinion of the Board, permitted himself to make some general observations, which seem, at first sight, to favour Mr. Dickie's contention. In that case an application was made for a rehearing. The decision in the earlier case had been given ex parte, and was pronounced by default. The earlier order was in these circumstances rescinded, and a rehearing was allowed. Lord Brougham, in giving the opinion of the Board, however, said: "It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be reheard, and that, an order once made—that is, a report submitted to Her Majesty, and adopted, by being made an Order in Council—is final, and cannot be altered. The same is the case of the judgments of the House of Lords. . . . . Whatever, therefore, has been really determined in these Courts must stand, there being no power of rehearing for the purpose of changing the judgment pronounced." Lord Brougham then pointed out that trivial errors in drawing up the judgment of the Board might competently be corrected. He then proceeded to add: "With the exception of one

(1) (1836) 1 Moo. P. C. 117, 126.

case in 1669, of doubtful authority here, and another in Parliament of still less weight in 1642 (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a rehearing upon the whole cause, and an entire alteration of the judgment once pronounced."

The case referred to by Lord Brougham as "of doubtful authority" was *Dumaresq* v. *Le Hardy*, 11th March, 1667–68. (1) There it was alleged that a matter of fact had been misrepresented to the earlier Court, that consequently the point in question was mistaken, and that the cause had been determined against the petitioner's clear and undoubted right and contrary to law. An order for rehearing was there made and the case was reheard, though, in the result, the Board adhered to the former decision.

The case of *Fenton* v. *Hampton* (2), cited during the argument, related to another proposition which dealt with the binding character of an earlier decision upon the Board in a later case. The Board there said (3): "We think we are bound by the decision in the case of *Kielley* v. *Carson* (4), the greater authority of which, as compared with *Beaumont* v. *Barrett* (5), it is quite unnecessary to enlarge upon." In *Kielley* v. *Carson* (4) the Board had refused to follow the earlier decision of *Beaumont* v. *Barrett* (5) for reasons which do not touch the argument in the present case. These decisions do not contribute to the solution of the problem in issue.

Reference may also be made to *The Singapore* (6), which again related to rehearing. In refusing a petition for rehearing, the Board said: "We do not affirm that there is no competency in this Court to grant a rehearing in any case. . . . . Although it is within the competency of the Court to grant a rehearing, according to the authorities cited above, still it must be a very strong case indeed, and coming

(1) 1 Moo. P. C. 117, 127n.
(2) (1858) 11 Moo. P. C. 347.
(3) Ibid. 396.
(4) (1842) 4 Moo. P. C. 63.
(5) (1836) 1 Moo. P. C. 59.
(6) (1866) L. R. 1 P. C. 378, 388.

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within the class of cases there collected" (i.e., in *Rajundernarain's* case (1)), "that would induce this Court so to interfere."

The case which in comparatively recent times comes nearest to formulating a general proposition with reference to the competency of a rehearing is *Hebbert* v. *Purchas.* (2) The decision of the Board is thus set out: "Their Lordships are of opinion, in respect of the two petitions addressed to the Crown, that no further proceedings should be taken therein. Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused with costs." It will be observed that the decision turned on expediency, not on competency, and that the Board abstained from laying down any general rule which is applicable to all cases.

The case of *Hebbert* v. *Purchas* (2) was considered in *Ridsdale* v. *Clifton.* (3) That was a case which raised the question of the finality of a previous decision, not inter partes but as against strangers. Having regard to the fact that the case was not concerned with questions of law affecting civil rights of property, but related to the public worship of the established church, and that in *Hebbert* v. *Purchas* (2) the decision was pronounced ex parte, the Board stated that "these considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in *Hebbert* v. *Purchas* (2) yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and, if they should find themselves forced to dissent from those reasons, to decide upon their own view of the law." The Lord Chancellor, Lord Cairns, in giving the decision of the Board, added with reference to decisions relating to

(1) 1 Moo. P. C. 117. (2) (1871) L. R. 3 P. C. 664, 671.
(3) (1877) 2 P. D. 276, 307.

civil rights of property: "Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases, absolutely final, but they certainly ought not to be reopened without the very greatest hesitation." The door is thus not closed against a request for a rehearing at the instance of a stranger to an earlier decision, even in a case concerned with civil rights of property, although it is plainly indicated that the Board would be slow to accede to such a request.

The case of *Hebbert* v. *Purchas* (1) was followed in *Venkata Narasimha Appa Row* v. *The Court of Wards* (2), in which again a petition for rehearing was refused. In delivering the judgment of the Board, however, Lord Watson said (3): "It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be reheard at the instance of one of the parties." But, he added . . . . "Even before report, whilst the decision of the Board is not yet res judicata, great caution has been observed in the rehearing of appeals."

Again, in *Tooth* v. *Power* (4), in which a previous decision was urged upon the Board as binding upon it, the Judicial Committee said: "Their Lordships think it right to add that, although, for obvious reasons, the case of *Barton* v. *Muir* (5) was relied on as an authority absolutely binding upon them by both parties at the Bar, yet it would have been their duty, had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given ex parte; and, that being the case, although great weight is due to the decision of this Board, their Lordships are 'at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law.' These are the words used by Lord Cairns when delivering the judgment of the Board in

(1) (1871) L. R. 3 P. C. 664, 671.
(2) (1886) 11 App. Cas. 660.
(3) (1886) 11 App. Cas. 663.
(4) [1891] A. C. 284, 292.
(5) (1874) L. R. 6 P. C. 134.

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Ridsdale v. *Clifton* (1), which contains a full exposition of the law upon this point."

In *Read* v. *Bishop of Lincoln* (2) their Lordships referred to *Hebbert* v. *Purchas* (3) and *Ridsdale* v. *Clifton* (1), and quoted the relevant passages from these decisions to which reference has already been made. The Board proceeded to say: "In the present case their Lordships cannot but adopt the view expressed in *Ridsdale* v. *Clifton* (1) as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law."

The result of these decisions is (1.) that there is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but (2.) that such an indulgence will be granted in very exceptional circumstances only. It is of the nature of an extraordinarium remedium.

The matter now before their Lordships, however, presents features which are widely different from those presented in the cases cited.

In the first place, as has already been pointed out, this is not a petition for a rehearing. It is a reference to the Board under s. 4 of the Judicial Committee Act of 1833. If, however, Mr. Dickie is right, the reference may be a futile and sterile proceeding, for, on his argument, one of the parties to it is foredoomed from the outset to failure because of the previous decision. If by that decision the matter of the present reference is res judicata, then the Board has been invited to take part in a solemn farce, involving the waste of judicial time.

In the second place, the reference was granted because of an alleged mistake of fact into which the previous Board was alleged to have fallen, and which is said to have been material to the issue determined by it. To suggest that,

(1) 2 P. D. 276. (2) [1892] A. C. 644, 655.
(3) L. R. 3 P. C. 664.

if that proposition be made out, this Board is constrained, blindfold, to adhere to a decision based on a material error in fact, appears to be repugnant to good sense, and to attribute to the Board, as a Court of final resort, an impotence which would be deplorable. None of the cases cited, unless it be of *Dumaresq* v. *Le Hardy* (1)—which, quantum valeat, is inimical to Mr. Dickie's argument—deals with such a situation ; and none of them appears to present an insuperable obstacle to a different decision being reached by the Board in this case from that pronounced in *Wigg's* case. (2)

In these circumstances their Lordships considered, after careful attention had been given to the argument on behalf of the civil servants, that it was ill-founded in law, and they accordingly informed the learned Attorney-General that they did not think it necessary to require him to reply on this topic.

The Transferred Officers Protection Association only challenge in this reference the award of the Government of the Irish Free State upon the two matters above mentioned, the one relating to the overriding maximum, and the other to the calculation of 75 per cent. in assessing the lump sum payment.

Mr. Dickie, on behalf of the transferred officers, argued that the claim to fair compensation under the article was not limited or restricted by limitations or restrictions in the Act of 1920, or in any British Treasury minute, and that the award in respect of these two matters was not fair compensation within the meaning of art. 10.

The Attorney-General, who attended their Lordships on behalf of His Majesty's Government, and Mr. Overend, on behalf of the Attorney-General for the Irish Free State, contended that the compensation awarded was fair compensation not less favourable than that accorded by the Government of Ireland Act, 1920, that it had been calculated on the principles laid down in the Treasury minutes, including the minute of March 20, 1922, and that the compensation so assessed was fair compensation within the meaning of the article.

(1) 1 Moo. P. C. 117, 127n. (2) [1927] A. C. 674.

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The solution of the problem depends in the first instance upon the meaning to be attributed to the language of the article. The articles are part of the statute law of the Irish Free State, and must be construed according to the principles of interpretation applicable to the language of a statute. Under the article the transferred officers who come within the statutory conditions are entitled to compensation which is fair and on terms not less favourable than those accorded by the Act of 1920. In their Lordships' opinion, the language of the article imports that the terms of the Act of 1920 are the minimum which should be receivable by the officers, but these terms are clearly not the maximum that may be awarded. The words are not *on* the terms accorded by the Act of 1920 but are "on terms not less favourable than those accorded," and imply by "not less than" that more may be awarded. The words "not less than" cannot be construed as if they were synonymous with "equivalent to" or "the same as." Their Lordships therefore cannot doubt that the compensation to be awarded is not limited by the terms under the Act of 1920, although these should be considered for the purpose of arriving at the proper award under the article. It is indeed essential that regard should be had to them, for the compensation would not in any event be fair which was less favourable than would be awarded under these terms.

Their Lordships have next to consider whether an award which imposes two conditions: (1.) the overriding maximum, and (2.) the limitation of 75 per cent. of the bonus in regard to the lump sum, is fair compensation under the article as interpreted by the Board. It follows from the observations already made by their Lordships that the mere fact that the assessment was calculated in accordance with the principles contained in the Treasury minute of March 20, 1922, does not establish that the compensation awarded is the true measure of the compensation to which the transferred officers have a legal right under the article and the Constitution of the Free State. Theirs is a legal right, as was decided by the previous Board in *Wigg's* case (1), and the right is not

(1) [1927] A. C. 674.

questioned in this reference. The position of the transferred servants under the article thus differs materially from that of servants of the Crown who have no such legal right. Sect. 30 of the Superannuation Act, 1834, expressly negatives it: "Nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act." Further, it is provided by s. 2 of the Superannuation Act, 1859, that "if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final."

Their Lordships are not unmindful of Mr. Dickie's argument that the Treasury minute could be challenged in the Courts by a servant of the Crown, but their Lordships find no justification for this contention. Sect. 30 of the Superannuation Act of 1834 is unrepealed, and is still the enactment that governs the position. The law was clearly stated in *Cooper* v. *The Queen* (1) and *Yorke* v. *The King* (2), and was recognized by the House of Lords in *Considine* v. *McInerney*. (3) In *Wigg's* case (4) the previous Board approved these decisions, and affirmed the proposition that no action could be brought to set aside or vary a decision of the Commissioners of the Treasury. At the hearing in this reference their Lordships were in complete accord with this opinion of the previous Board, and intimated to the Attorney-General that they would not require argument from him in reply. Although their Lordships hold that the Treasury minute of March 20, 1922, is not binding upon the transferred officers who come within the statutory conditions, the minute requires most careful consideration in arriving at the amount that should be awarded under art. 10. The minute was issued by the Commissioners of the Treasury in pursuance of the discretion entrusted to them. It was submitted to Parliament and is binding upon the servants

(1) (1880) 14 Ch. D. 311.
(2) [1915] 1 K. B. 852.
(3) [1916] 2 A. C. 162.
(4) [1927] A. C. 674.

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of the Crown. It announces the decisions of the Treasury on certain disputed matters regarding the calculation of the bonus for the purpose of computing the retiring allowances. After stating that the bonus had now become a regular part of the civil servant's remuneration, it recites that hitherto 75 per cent. of the bonus payable at the time of retirement had been included in the emoluments upon which, together with the salary, the retiring allowances had been computed. It directs that henceforward all awards of pension should be calculated on the salary and emoluments, together with an addition of the bonus calculated on a sliding scale, by reference to the average cost of living for the three preceding months, and subject to reassessment quarterly. It further directs that, as under the Superannuation Acts the retiring allowances could not exceed a prescribed proportion, appropriate to the retiring civil servant's length of service, of his salary and emoluments on the date of his retirement, the additional allowance or pension payable at any time will be subject to the overriding maximum. This condition is imposed in relation to those civil servants whose rights are limited by the Superannuation Acts, but their Lordships cannot think that it should be applied to the annual allowance or pension payable to transferred civil servants, whose rights are governed by art. 10 and are not limited by the Superannuation Acts. It is difficult to understand why in such circumstances the annual allowance, which will be reduced according to the sliding scale when the cost of living figure falls, should not be increased if the cost of living figure rises. The amount of the bonus ascertained at the date of retirement is not conclusive, it may be made to vary and the annual allowance will vary accordingly, but, if it be capable of reduction, it should equally be capable of increase. If, notwithstanding the rise in the cost of living, the annual allowance was not increased, it would obviously be to the disadvantage of the officer who must submit to reduction should the cost of living fall, and there is no sufficient reason why such a condition should be imposed in regard to officers who are entitled to the compensation granted by the article.

Their Lordships are therefore of opinion that the condition known as the overriding maximum attached to the award cannot be maintained.

In regard to the lump sum payment the Lords of the Treasury came to the conclusion, having regard to all the circumstances, that it was not possible to devise a more satisfactory plan than to base the award as hitherto upon 75 per cent. of the bonus, to be calculated by reference to the cost of living figure, as in the case of annual allowances or pensions. It is to be noted that the proportion of 75 per cent. is retained in regard to the lump sum payment, although it is abandoned for the purpose of the calculation of the annual allowance. It does not purport to be based upon exact calculation; it is retained at 75 per cent. as a practical method of allowing for the variability factor. The lump sum is calculated (as provided in the Superannuation Act, 1909, s. 1, sub-s. 2) at a sum equal to one-thirtieth of the annual salary and emoluments multiplied by the number of completed years of service. It is stated in the minute that the adjustment of the lump sum according to this formula could only be based upon broad assumptions and could not be exact. Their Lordships find themselves in agreement with the reasoning in this respect of Meredith J., who tried the case in the first instance. The calculation on 75 per cent. is an arbitrary rule; it is a rough and ready way of dealing with the difficulty. It was adopted by the Treasury in their discretion as a way out of a perplexing situation. It seems difficult to justify its application under art. 10. The lump sum is intended to provide a sum for capital expenditure, it may be for the purchase of a house, or to make provision for dependants, or otherwise. It is a commutation, payable immediately, of part of the pension, which under the Act of 1909 is reduced from the one-sixtieth proportion to one-eightieth. In assessing compensation under the article their Lordships think it fair and reasonable to arrive at the sum by calculating it on the pension payable at the first year of retirement. Their Lordships therefore agree with the opinion of the previous Board and of Meredith J.

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in this respect, and hold that the calculation should be made upon the full amount of the bonus, and that the limitation to 75 per cent. cannot be sustained.

After careful consideration their Lordships have thus arrived at the same conclusions as the previous Board. In view of this result it becomes unnecessary to deal with the ingenious argument of Mr. Dickie, whereby he sought to establish that, although the two officers in *Wigg's* case (1) had not at the date of the minute of March 20, 1922, been transferred to the Irish Free State, they had on March 2, 1922, that is before the date of the minute, been transferred *from* the service of the British Government and, according to his contention, *to* that of the Government of Southern Ireland, and consequently the minute could not be held to apply to them. No Order in Council had been issued which effected this transfer, but Mr. Dickie argued that it must be taken as matter of law that the officers had been transferred on March 2, 1922, because by virtue of s. 73 of the Government of Ireland Act, 1920, this was the latest date at which an " appointed day " under the Act could be fixed. Further, he sought to prove by reference to various Orders in Council that a Government of Southern Ireland had been set up before March 2, 1922, and that existing Irish officers had been transferred to it. He contended also that the Board in *Wigg's* case would have been fully justified in assuming that the officers had at the date of the minute been transferred to the Government of Southern Ireland instead of " to the Government of the Irish Free State," and the same decision would have been reached. The arguments were complicated and raised difficult questions. At the hearing their Lordships were not convinced of the soundness of the propositions advanced, but, in view of the conclusions of the Board, it has become unnecessary to examine them more closely or to pronounce a final opinion upon them.

Their Lordships have given careful consideration to the decision of the previous Board in *Wigg* v. *Attorney-General for the Irish Free State* (1), and they are satisfied that the

(1) [1927] A. C. 674.

statement regarding the date of transfer of the two officers had no effect upon the advice tendered by that Board to His Majesty. The Lord Chancellor, when expressing the opinion of the Board upon the appeal, said: "The question to be determined is whether and to what extent the disputed conditions are in accordance with the statutes," and his Lordship then proceeded to give the reasons of the Board for arriving at their conclusions. These are independent of the particular date of transfer, for they are based upon the view that when an existing Irish officer had been transferred to the Provisional Government or the Government of the Irish Free State he became entitled to the benefit of art. 10.

Their Lordships are of opinion that the claims made in this reference on behalf of the transferred officers in relation to the award have been established, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for the Transferred Officers Protection Association: *Herbert Z. Deane.*

Solicitors for Irish Free State Government: *Coward, Chance & Co.*

Solicitor for British Government: *Treasury Solicitor.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR MANITOBA AND ANOTHER . . . . . } APPELLANTS ;

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

ATTORNEY-GENERAL FOR ONTARIO . INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Canada (Manitoba)—Legislative Power—Dominion Companies—Provincial Act affecting Capacity of Dominion Companies—Sale of Shares Act (C. A. Man., 1924, c. 175)—Municipal and Public Utility Board Act (Man., 1926, c. 33)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

The Sale of Shares Act, 1924, and the Municipal and Public Utility Board Act, 1926, both of Manitoba, are ultra vires under the British North America Act, 1867, s. 92, in so far as they purport to prohibit Dominion companies from selling their own shares within the Province without the consent of a Provincial Commissioner or Board, since thereby they interfere, directly and substantially, with the status and capacity conferred on the companies by Dominion legislation intra vires under s. 91.

John Deere Plow Co. v. *Wharton* [1915] A. C. 330 and *Great West Saddlery Co.* v. *The King* [1921] 2 A. C. 91 applied.

Lukey v. *Ruthenian Farmers' Elevator Co.* [1924] S. C. R. 56 approved.

Judgment of the Court of Appeal for Manitoba 36 Man. L. R. 583 affirmed.

APPEAL (No. 125 of 1927) from a judgment of the Court of Appeal for Manitoba (June 6, 1927) answering questions referred to that Court under R. S. Man. 1913, c. 38.

The questions referred were whether two Acts of the Manitoba legislature—namely, the Sale of Shares Act (Consolidated Amendments, 1924, c. 175) and the Municipal and Public Utility Board Act (Stat. of Man. 1926, c. 33)—were intra vires in so far as they purported to apply to the sale of its own shares by a Dominion company.

The material provisions of the Acts in question appear from the judgment of the Judicial Committee.

* *Present :* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKIN, and CHIEF JUSTICE ANGLIN.

The Court of Appeal, following *Lukey* v. *Ruthenian Farmers' Elevator Co.* (1), answered "no" as to each of the Acts. The judgment is reported at 36 Man. L. R. 583.

1928. July 16, 17, 19. *R. W. Craig K.C.* (*Attorney-General for Manitoba*) and *Frank Gahan* for the appellants; *E. Bayley K.C.* for the Attorney-General for Ontario, intervener. The Acts were wholly within the legislative power of the Province under the British North America Act, 1867, s. 92, heads 16 (local and private matters), 13 (property and civil rights), 9 (licences). The subject-matter was not within any of the enumerated heads under s. 91; it is well settled that head 2 (trade and commerce) should be given a very limited interpretation. The decisions of the Board in *John Deere Plow Co.* v. *Wharton* (2) and *Great West Saddlery Co.* v. *The King* (3) are distinguishable, since the Acts now in question do not discriminate between Dominion companies and Provincial companies. The judgments in both cases recognize the power of a Province to make laws of general application affecting the civil rights of a Dominion company. The limitation upon that power is stated in the former of those judgments as follows (4): "The status and powers of a Dominion company as such cannot be destroyed by Provincial legislation." A consideration of the provisions of the Acts now in question shows that they had not that effect. [In addition to cases mentioned in the judgment reference was made to *Attorney-General for Canada* v. *Attorney-General for Alberta* (5) and *Toronto Electric Commissioners* v. *Snider*. (6)]

Cannon K.C. (*Solicitor-General for Canada*) and *Geoffrion K.C.* for the respondent. Upon the principles laid down in *John Deere Plow Co.* v. *Wharton* (2) and *Great West Saddlery Co.* v. *The King* (3) the two Acts were ultra vires in so far as they purported to preclude Dominion companies from selling their shares in the Province. The Acts thereby interfered

(1) [1924] S. C. R. 56.
(2) [1915] A. C. 330.
(3) [1921] 2 A. C. 91.
(4) [1915] A. C. 330, 341.
(5) [1916] 1 A. C. 588, 595, 596.
(6) [1925] A. C. 396, 409.

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directly with the status and capacity validly conferred upon Dominion companies by the Dominion Companies Act (R. S. Can. 1914, c. 79), ss. 28, 31, 32, 44, 51, 53, 58, 75, 84. The Acts in question were in their substance Acts dealing with companies, not Acts as to licences, or civil rights, or local matters. Provisions similar to those in the Acts could have been introduced into the Dominion Companies Act if the Dominion legislature had seen fit. [Reference was made to *Dobie* v. *Temporalities Board* (1); *La Compagnie Hydraulique* v. *Continental Heat and Light Co.* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers.* (3)]

R. W. Craig K.C. replied.

Dec. 10. The judgment of their Lordships was delivered by

VISCOUNT SUMNER. By Order in Council dated June 4, 1927, two questions were referred to the Court of Appeal for Manitoba for hearing and consideration, and in due course the Court of Appeal, following the decision of the Supreme Court of Canada in *Lukey* v. *Ruthenian Farmers' Elevator Co.* (4), returned the answer "No" to both questions, but gave leave to appeal to His Majesty in Council. In effect, therefore, the present appeal, brought pursuant to that leave, is an appeal against the decision above mentioned.

The questions were: (1.) Are the provisions of the Sale of Shares Act of Manitoba, being c. 175 of the consolidated amendments, 1924, intra vires of the Provincial legislature in so far as they purport to apply to the sale of its own shares by a Dominion company?

(2.) Assuming that the Municipal and Public Utility Board Act of Manitoba, being c. 33 of the 1926 statutes of Manitoba, has been duly brought into force by proclamation of the Lieutenant Governor, are the provisions of the said c. 33 intra vires of the Provincial legislature in so far as they purport to apply to the sale of its own shares by a Dominion company?

(1) (1882) 7 App. Cas. 136.
(2) [1909] A. C. 194.
(3) [1924] A. C. 328, 347.
(4) [1924] S. C. R. 56.

The statutes in question have to be considered as a whole, and with the assistance of counsel their Lordships have gone through the sections in detail, but those on which the questions referred specially depend are ss. 4 to 13 inclusive of the earlier and ss. 162 to 165 inclusive of the later Act. Their effect may be sufficiently summarized as follows:—

Under the Sale of Shares Act no company, however or wherever incorporated, might sell or offer to sell or try to sell in Manitoba any shares, stocks, bonds or other securities of any company (with exceptions not for present purposes material) without first obtaining from the Public Utility Commissioners a certificate and a licence. It was common ground that the word "sell" in both Acts included, along with sales in the stricter sense of the word, subscriptions and applications by members of the public for shares in a company or securities created and issued by a company, and allotment of such shares or securities in accordance with the applications, so as thereby to make the allottees corporators or secured creditors of the company. In order to obtain the requisite permission to sell, the company was required to file with the Commissioner a statement, showing in detail the plan on which it proposed to transact business, a copy of all contracts and instruments to be entered into between itself and its contributors, a statement showing its name and location, and an itemised account of its actual financial condition and the amount of its property and liabilities, and such other information touching its affairs as the Commissioner might require, with certain other documents relating to the law governing its incorporation in the case of a company not organized under the laws of Manitoba. The Commissioner was thereupon to examine these materials, and if in his judgment the company satisfied him with regard to the above mentioned matters, he was to grant the certificate and permission required; in the contrary event he might require the company to make such alterations in its articles, contracts and plan of business as in his judgment might be necessary, and until he was satisfied in these respects his permission was to be withheld.

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Turning to the later Act, the Municipal and Public Utility Board Act, 1926, which repeals the previous Sale of Shares Act and takes its place, it is to be observed that the duties of the Commissioner are now to be discharged by a Board, called the Municipal and Public Utility Board, an incorporated body, consisting of a chairman and two other members. The Board acts with more publicity, more formality, and more resemblance to the proceedings of a court of law than the Commissioner under the earlier statute and, so far as the present matter is concerned, its conclusions are open to review by the Court of Appeal on any point of law or on any question affecting the jurisdiction of the Board, but its powers and functions do not appear to differ for present purposes from those of the Commissioner.

Sect. 162 provides as follows: "No person, firm, or corporation shall sell, or offer or agree to sell, or directly or indirectly attempt to sell in Manitoba, any shares, stocks, bonds or other securities of or issued by any company, unless the company has first been approved by the Board as one the securities of which are permitted to be sold in Manitoba and a certificate to that effect . . . . issued by the Board."

There follow elaborate provisions under which the Board is enabled, as the Commissioner had been, to arrive at a decision, favourable or unfavourable to the company's application for the required permission, and in either case, subject always to the above appeal, its decision is final.

It will thus be seen that, under requirements made in their discretion by the Commissioner or the Board, the exercise of powers expressly given to the company might be forbidden and compliance with statutory obligations prevented, such as sales of the company's shares, directed in terms by the Dominion Companies Act, s. 58, sub-s. 2, or permitted in specific cases, s. 75, or generally for the company's purposes, s. 84 (*c*), and conclusions, duly arrived at by the competent Dominion Minister, might in effect be overridden or set aside by the Provincial Commissioner or the Board. The Company might be prevented from having the benefit attaching to compliance with s. 28, and so

eventually forfeit its Dominion incorporation, s. 29, and in general it could only launch its enterprise subject to provincial and non-Dominion requirements.

In the case of a company, incorporated for purposes not wholly Provincial and under the powers of legislation of the Dominion of Canada, their Lordships cannot doubt that the Provincial legislation above summarized interferes, directly and not merely incidentally, in material respects and to a substantial extent, with the capacity of the company to raise capital, as and when its directors may deem it necessary to do so in accordance with its articles and the provisions of the Dominion Companies Act, and so derogates from its status and consequent capacities as a Dominion company.

Their Lordships were informed, and the Acts clearly bear it out, that among the objects with which this legislation was framed was the protection of inexperienced residents in the Province from the temptation to participate in enterprises ill-designed, ill-equipped, and ill-conducted, and from consequent losses of their savings and disappointment of their hopes. The subject was one well worthy of the attention and care of statesmen and, it may be, was peculiarly within the domain of Provincial regulation; the method adopted was that of prevention, instead of or in addition to such cure as criminal prosecution and punishment can afford. They do not doubt that the Commissioner under the one Act and the Board under the other have performed their duties with care and discretion and have been selected for their experience and judgment in the kind of matters with which they deal. They think it probable that the risk of any substantial errors of judgment on their part is small and that none but unmeritorious companies need find the requirements burdensome, the delay prejudicial, or the result matter of anxiety or loss. It is further the case that there is no dicrimination against Dominion companies as such, since all companies are included in the legislation; that companies, which can sell their shares or securities in other Provinces or abroad or can borrow without security or raise

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additional funds by capitalizing undistributed profits, are at liberty to do so; further, by s. 6 of the first Act and by s. 160 (i.) (*g*) of the second, it is permissible to them to sell their shares or securities in the Province without licence from the executive, provided that such sale or attempt to sell is not "made in the course of continued or successive acts" or "transactions of a like character." This last provision appears to be of slight value. Substantially, if capital is to be raised it must either be raised by "selling" the securities issued piecemeal in a succession of transactions to separate purchasers and allottees, or by disposing of the whole issue to some financial house in one transaction. This alternative may not be feasible at all, but even if it were, as the purchasing house in its turn could only dispose of its investment to the public by successive sales to or transactions with the public, which would come under the Acts, the fetter on the financial autonomy of the Dominion company would operate although at one remove, and would interfere with its essential powers in the same way though possibly in a somewhat different degree. It is sufficient to add that, although ss. 174, 178 and 193 of the Act of 1926 may mitigate the effect of the prior legislation, they do not remove the flaw in its validity, which s. 162 preserves.

The general effect of these provisions remains. An artificial person, incorporated under the powers of the Dominion with certain objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is under these Acts liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilized in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that executive may take of the plans, promises and prospects of a creation of the

Dominion. The question is whether legislation, which must in many cases have this effect, even though not in all, is intra vires the legislature of Manitoba. It appears to admit of only one answer in view of what is now settled law with regard to the effect of ss. 91 and 92 of the British North America Act on this class of legislation.

The case was argued with much learning and resource, partly on the construction of ss. 91 and 92, partly on the decisions of the Supreme Court of Canada and of their Lordships' Board. It was said that no more was claimed for the powers of the Provincial legislature than was clearly within its powers in the case of a natural person; that a decision adverse to the validity of these statutes would enable any group of men, who wished to escape Provincial prohibitions, which bound them as natural persons, to incorporate themselves as a Dominion company and thus defy the Provincial legislation; that power to invest an incorporated entity with capacities is quite distinct from authority for their unrestricted exercise; and that Dominion powers should not be interpreted so as to give protection to fraud. The ultimate authority after all is the British North America Act, and its construction is in this connection no longer in doubt. These and analogous contentions have been so often canvassed and decided that no good purpose can be served by a re-examination of them. As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the Provinces generally, it is not competent to the legislatures of those Provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree. The reasoning, by which this result has been arrived at, has been most fully developed in the judgments of the Board in *John Deere Plow Co.* v. *Wharton* (1) and *Great West Saddlery Co.* v. *The King.* (2) In their Lordships' view the statutes now under consideration do so impair the status and powers of such a company, and accordingly decisions as to property and civil rights like

(1) [1915] A. C. 330. (2) [1921] 2 A. C. 91.

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Citizens' Insurance Co. v. *Parsons* (1) and *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (2), or as to local taxation like *Bank of Toronto* v. *Lambe* (3), or as to local regulations of the liquor traffic or other similar matters, like *Attorney-General for Ontario* v. *Attorney-General of Canada* (4), and case of the *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (5), do not govern the present case.

This is not a mere case of fixing the conditions of local trade or of regulating the form or the formalities of the contracts, under which business is to be carried on within the Province, or of prescribing the restrictions under which property within the Province can be acquired, nor is it a mere matter of local police regulations, or local administration, or raising of local revenue, or a mere means of attaining some exclusively Provincial object. The capacity of a Dominion company to obtain capital by the subscription, or so called sale, of its shares, is essential in a sense, in which holding particular kinds of property in a Province or selling particular commodities, subject to Provincial conditions or regulations, is not. Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose. Again, with regard to the later Act, passed after, and no doubt in view of, *Lukey* v. *Ruthenian Farmers' Elevator Co.* (6), in their Lordships' view the objections arising under the earlier Act are not met by the provisions, which operate on natural persons within the Province, with or through whom the Dominion company will require to deal; for the object and effect are the same, and it is not permissible to do indirectly what cannot be done directly.

Their Lordships are so sensible of the difficulties in which the Provincial legislatures may find themselves placed in

(1) (1881) 7 App. Cas. 96.
(2) (1883) 9 App. Cas. 157.
(3) (1887) 12 App. Cas. 575.
(4) [1896] A. C. 348.
(5) [1902] A. C. 73.
(6) [1924] S. C. R. 56.

such matters as this, and so anxious not to appear to say anything that might restrict their authority in any case distinguishable from the present, that they refrain from resting their decision upon any other feature in the Acts under discussion than the interference with the status of a company incorporated under Dominion laws, such as they have mentioned.

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Their Lordships are of opinion that the Court of Appeal for Manitoba rightly answered the questions referred to them, and that their decision ought to be affirmed, and so they will humbly advise His Majesty.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*
Solicitors for intervener: *Freshfields, Leese & Munns.*

[PRIVY COUNCIL.]

POPE APPLIANCE CORPORATION . . APPELLANTS;

AND

SPANISH RIVER PULP AND PAPER MILLS, LIMITED . . . . . } RESPONDENTS.

J. C.* 1928 *Nov.* 23.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Patent—Novelty—Anticipation—Subject-matter—Prior Specifications—Analogous User—Infringement—Mechanical Equivalent—Privy Council Practice—Concurrent Findings—Erroneous Principles applied—Construction of Canadian Act—Prior public Use outside Canada—Patent Act (R. S. Can., 1906, *c.* 69), *s.* 7.

The appellants sued the respondents for infringement of their Canadian patent, granted in 1919, for a device in connection with a Fourdrinier paper-making machine. The machine has several calender rollers closely over one another, and the paper has to be passed between each pair. The patented device consisted of a scraper (called a "doctor") with an air blast through it, by which paper adhering to the top roller was detached therefrom, the air blast being so directed that the paper was caused to adhere to the lower roller, and so to be carried round and pass between the next pair. The device worked successfully, and

* *Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD DARLING, and LORD ATKIN.

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had been generally adopted. In support of pleas of invalidity the respondents relied on prior specifications, not put into practice, in which a "doctor" and an air blast or air blasts had been described. Those describing devices for use with calender rolls were of 1884 and 1885, and did not show a single air blast directed with the effect described above. In one (of 1905), for a device for use with drying rollers, there was a single air blast, as in the appellants' device, but the paper had to pass between only one pair of drying rollers, it was then carried away on a felt band, on which the air blast caused it to impinge. The trial judge held that the appellants' patent was bad for want of novelty, and his decision was affirmed by the Supreme Court of Canada.

The respondents also pleaded that the patent was invalid under the Patent Act (R. S. Can., 1906, c. 69), s. 7, which requires that an invention in order to be the subject of a patent must "not have been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent thereof in Canada." The patentee had used his device at works in the United States more than a year before his application. The respondents also denied infringement:—

Held, (1.) That the trial judge had applied the wrong principles in that, (*a*) he had treated extracts from various prior publications as together constituting anticipation, and (*b*) he had treated an analogous user of what had been merely described as not being patentable, whereas the principle as to analogous user applies only to things previously used.

(2.) That the appellants' device was a patentable invention, since the use of a single air jet directed so as to cause the paper to adhere to the lower calender roller was new; the length of time between the publications relied on and the patent, which related to a much needed device, showed that the device involved inventive ingenuity.

(3.) That the patent was not invalid under s. 7 of the Canadian Patent Act, because the words "in Canada" in that section referred to "public use," not to "application"; the latter construction would be pleonastic.

(4.) That the apparatus used by the respondents, in which a single air blast by impinging on the blade of the "doctor" was diverted to the same spot on the upper roller as in the appellants' device, was an infringement, since that was an obvious mechanical equivalent.

British Thomson Houston Co. v. *Metropolitan Vickers Electrical Co.* (1927) 45 R. P. C. 1, and authorities there cited, followed.

On the construction of the Canadian statute: *Smith* v. *Goldie* (1883) 9 Can. S. C. R. 46, approved; *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (1910) 13 Ex. C. R. 186, disapproved.

As no question of general importance usually arises in a patent case, their Lordships deprecated the granting of special leave to appeal in cases of that nature in which there were concurrent judgments.

Judgment of the Supreme Court of Canada [1928] S. C. R. 20 reversed.

APPEAL (No. 33 of 1928) by special leave from a judgment of the Supreme Court of Canada (December 16, 1927) affirming

a judgment of the Exchequer Court of Canada (August 5, 1926).

The appellants sued the respondents in the Exchequer Court for an injunction and other relief for the infringement of two Canadian letters patent, Nos. 186,500 and 192,726, issued in 1918 and 1919 respectively. The respondents admitted infringement of the patent first mentioned and judgment thereon was given accordingly. The action as to patent No. 192,726 was heard together with an action brought by the appellants against another company as infringers. The respondents pleaded (1.) want of novelty, and no subject-matter; (2.) anticipation; (3.) a denial of the infringement; (4.) that the patent was invalid under provisions of the Patent Act (R. S. Can., 1906, c. 69). In their case, upon the present appeal, they relied further upon s. 7 of the amending Act, 11 & 12 Geo. 5, c. 44 (Dom.).

The facts are fully stated in the judgment of the Judicial Committee.

The trial judge, in a judgment reported at [1927] Ex. C. R. 28, held that the appellants' patent was invalid for want of novelty and dismissed the suit. The judgment was affirmed by the Supreme Court of Canada, the appeal being reported at [1928] S. C. R. 20.

1928. July 5, 6, 9, 10, 12, 13. *Whitehead K.C.* and *R. S. Smart K.C.* for the appellants.

A. W. Anglin K.C. and *C. C. Robinson K.C.* for the respondents.

In addition to cases referred to in the judgment here reported reference was made to *Lyon* v. *Goddard* (1); *Riekmann* v. *Thierry* (2); *Vickers & Co.* v. *Siddell* (3); *Read* v. *Stella Conduit Co.* (4); and, on the construction of the Canadian Act, to *Lombard* v. *Dunbar Co.* (5); *Wright & Corson* v. *Blake Services, Ld.* (6)

(1) (1893) 10 R. P. C. 334, 345.
(2) (1896) 14 R. P. C. 105, 115.
(3) (1890) 15 App. Cas. 496.
(4) (1910) 33 R. P. C. 191, 199.
(5) (1910) 4 S. C. N. B. (Eq.) 271.
(6) [1926] S. C. R. 434.

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Nov. 23. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. The present action is directed against an infringement of a Canadian patent, 192,726 of 1919, which is owned by the appellants. There were originally two actions brought, one against the present respondents, the Spanish River Pulp Company, and the other against a company called the Abitibi Company. The cases were tried together, and the evidence in each admitted in the other. The defences were various: (1.) Want of novelty and no subject-matter; (2.) anticipation; (3.) a defence founded on certain Canadian statutes, which will be explained later; and (4.) denial of infringement. The trial judge gave judgment in favour of the respondents in respect of (1.). He dealt with (2.), and used much of what had been proved under that head in support of his judgment on (1.), but he did not formally pronounce that there had been anticipation. He found it in these circumstances unnecessary to consider (3.) and (4.). His judgment was confirmed simpliciter by the Supreme Court of Canada, who were unanimous.

The present appeal is brought by special leave. Their Lordships think it necessary to say that it must have been conveyed to their Lordships who granted the leave, that the case raised an important and general question. Speaking generally, a patent case has to do with the construction and the infringement of one or more particular patents, and it cannot often be said that any general question is thereby raised. In such cases, where there have been concurrent judgments of the judge of first instance and the Court of appeal, their Lordships would deprecate the idea that leave should be given to appeal to the King in Council.

Leave, however, having been given, it is their Lordships' duty to deal with the case, and they must say at once that the case does not fall within the rule known as the rule of concurrent findings. This matter was exhaustively dealt with in the recent case of *Robins* v. *National Trust Co.* (1); in the judgment this is said (2): "There is, however, also another way of preventing the application of the rule. If it can be

(1) [1927] A. C. 515. (2) [1927] A. C. 518.

shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all." It is quite true that, dealing with the respective functions of judge and jury, there is high authority to the effect that while it is for the judge to construe a specification, it is for the jury to contrast the specification so construed with the facts of the case as found so as to arrive at a conclusion either as to anticipation or as to novelty and subject-matter, but there must be no misdirection as to the facts found or as to how they may be handled. In a case tried by a judge alone he fulfils the functions of both judge and jury. If, therefore, it can be shown that in the view he has taken there is something which, if addressed to a jury, would be misdirection, there is no finding of pure fact in the judgment, and the rule, as explained above, does not apply. Their Lordships therefore felt bound to hear counsel on the merits of the case so as to come to a conclusion thereon.

The patent is for a device to be used in connection with the calender rolls of a Fourdrinier paper-making machine. To make the matter intelligible it is necessary to describe the machine. The Fourdrinier paper-making machine is a machine for making paper from wood pulp. The pulp starts from a receptacle where it is in a highly triturated state and full of water, which at that stage represents 99 per cent. of the mixture. It is spread on to a travelling band of the breadth of what is to be the eventual paper sheet. This band is of sieve-like formation, and as the material travels forward it gradually loses its water. A large part of the water being gone, it next goes on to a felt band, and that band goes through press rollers which squeeze still more of the water out, and then through drying rollers which effect the final drying. By this time the material has assumed the form of paper, and the final operation is to put a polished surface on it, which is effected by what are known as calender rollers. All the motion is continuous. Calender rollers are arranged in a stack, i.e., one above the other, generally six or eight in number. The rollers all closely touch. The lowest roller

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alone is actuated by power, the other rollers obtaining their motion by reason of the frictional contact between each. The paper goes into the bite below the topmost roller and the second, then back to the bite of the second and third, and so on to the lowest, from whence it is taken to a receiving roller on which it is accumulated. In its progress through the calenders, owing to the severe pressure between the smooth surfaces, it obtains a polished or glazed appearance. Now, once the whole process is in operation, it is evident that what has been called the accumulating roller can be mechanically moved, and so moved will pull the paper through the calender rolls; but at the commencement of the operation, or if from any reason the paper gets broken so that its continuity is destroyed, this is not so. The end of the paper must then in some way be threaded through the successive calender rolls. This threading will be alternately on one side or the other. Thus, if the paper, as one looks at the end of the rolls, goes between the top and the second roll, which latter is turning clockwise, the next thread will have to be done on what is the right side of the rolls from the point of view of the onlooker. The next will have to be on the left, as the second roll will be moving anti-clockwise, and so on. Prior to the present patented device this threading was done by hand, a man being stationed on each side of the rolls. It was easy enough to direct the paper between the first pair of rolls, but after that the direction of the paper had to be reversed, and it became a risky business, as the slightest misplacement of the hand led the fingers to be caught and pinched in the rolls, and it is in evidence that nearly all the older workmen had pinched and mutilated fingers. The object of the patented device is to effect this threading automatically without the necessity of the paper ever being touched by hand. The device consists in the placing of an air jet so directed as to play upon the upper roll just where it emerges from the nip or point of contact between it and the immediately lower roll. This air jet is placed inside and combined with what is called a "doctor," but which might in less technical language be called a scraper, which scrapes

against the surface of the upper roll. The tendency of the paper which approaches the nip adhering to the upper roll is after it passes the nip still to adhere to the upper roll. The air blast and " doctor " combined detach it from the upper roll and the air blast forces it on to the lower roll, and from its angle of reflexion has what may be termed a " hugging " operation, i.e., it keeps it adhering to the lower roll, so that it is pushed into the nip which that roll makes with the roll beneath it. Passing through that nip it is again greeted by an air blast and " doctor " which perform a like operation with regard to the roll beneath, and so it is threaded automatically, taking the path of a flattened spiral and at the bottom being led on to the accumulating roller. The operation is not at first done with the whole breadth of the paper, but what is termed a leading strip is cut at the side. As soon as the leading strip is fully engaged a knife is made to travel diagonally which widens the strip to the full breadth of the paper.

There is no controversy as to this device being completely successful. It has, since its appearance, been universally adopted. Nor is there any doubt that it is adequately described in the patent and adequately claimed. The objections, as already stated, are based on want of novelty and subject-matter, that is, want of invention, and also of anticipation. It will be convenient to examine anticipation first, as much of the argument on want of invention is bound up with what was disclosed by the patents which are said to anticipate. The test of anticipation has been dealt with in many cases. They were enumerated in the very recent case of *British Thomson Houston Co.* v. *Metropolitan Vickers Electrical Co.* (1) A passage in the judgment (2) runs thus: " In *Otto* v. *Linford* (3) Holker L.J. expresses himself thus: ' We have it declared in *Hill* v. *Evans* (4) as the law, and it seems very reasonable, that the specification which is relied upon as the anticipation of an invention must give you the same knowledge as the specification of the invention itself.' And

(1) 45 R. P. C. 1.
(2) Ibid. 23.
(3) (1882) 46 L. T. 35, 46.
(4) (1862) 4 D. F. & J. 288.

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in *Flour Oxidising Co.* v. *Carr & Co.* (1) Parker J. (afterwards Lord Parker) says: 'Where the question is solely a question of prior publication, it is not, in my opinion, enough, to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specification contains clear and unmistakable directions so to use it.' And the remarks of Lord Dunedin in *Armstrong, Whitworth & Co.* v. *Hardcastle* (2) are quite in line with these dicta." In the same case the test is stated (3), and turning the particular instance to the general may be expressed thus: Would a man who was grappling with the problem solved by the patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand, have said, "That gives me what I wish?"

A number of patents were appealed to by the respondents as anticipations, and their Lordships will deal with them seriatim. It may be mentioned in passing that except the patents of Pope himself, all the others were paper anticipations. That is, there is no evidence that the machines described had ever been made under them or proved to work successfully. When particulars of objection were lodged the respondents tabled no fewer than 158 specifications, but nearly all of them at the trial passed into the oblivion which doubtless they deserved. Their Lordships are accordingly only concerned with those that were mentioned in the judgment of the Courts below, or were brought before them in argument. Two very early patents, of date 1858 and 1859, U.S. patents by Beach and Mackay, were mentioned, but not really insisted on. They had to do with printing presses and, except that they showed that air could be used to direct the course of a sheet of paper, they have nothing at all to do with the present question. The two earliest patents touching the present question were those of Imray, April 5, 1884, and Smith, U.S., September, 1885. But these patents which, as already stated, were never, so far as is shown, put into use by the machines described being made, at once compel the

(1) (1908) 25 R. P. C. 428, 457. (2) (1925) 42 R. P. C. 543, 555.
(3) 45 R. P. C. 1, 22.

observation that the problem, to wit, of avoiding pinched fingers in inserting paper through calender rolls was known in 1884, and yet it is proved that till 1919—nearly thirty-five years later—the problem was never practically solved. This fact will be further adverted to hereafter. Imray's device consists in a whole series of jets of air arranged, first of all against the upper roll, and then all round the periphery of the lower roll till the next nip. This is a great complication as compared with the present device. So far from there being any indication of the discovery that one jet directed against the upper roll at a certain angle would by reflexion keep the paper adhering to the next roll up to the next nip, the very device employed indicates the opposite, because he thought it necessary to have the successive jets arranged at succeeding parts of the periphery of the lower roll. Smith's patent of 1885 puts in the plainest terms that the object of the patent is to avoid the jamming of fingers which results from hand manipulation. His solution, according to the patent, consists in having sets of wind cases hugging alternately each side of the periphery. He also uses a "doctor" which strips the paper from the upper roll, and it was then kept close to the lower roll by the wind, steam, or gas, which he directs from the wind cases. As already mentioned, this was, so far as known, never constructed, so that whether it would have acted successfully or not remains doubtful. But in any case it is obvious that the whole idea of the encirclement of the periphery by a frame is just a rather more complicated form of Imray, and no one could guess from it that one jet, when arranged as in the present patent, would have the desired effect. Smith's two succeeding patents are just modifications of the first, but he adds a piercing of the "doctor" so as to have wind all the way. Then comes the patent on which learned counsel for the respondent laid most stress—namely, Schulte's patent. Schulte took out a patent both in England and in Germany. So far as the letterpress is concerned, the one is just a translation of the other, but the drawing in the German patent is the clearer of the two, and therefore counsel preferred to refer to it.

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Now, the Schulte patent has nothing to do with calender rolls at all; it has to do with the drying rolls, and it proposes an automatic device for dealing with the paper as it issues from the nip between the drying rolls. Drying rolls are only in pairs. This consists of a scraper or "doctor," and the scraper has an air blast through it. The point of similarity on which the respondent founds is that here you have depicted a "doctor" and an air blast through the "doctor" directed to the same spot on the upper roll, i.e., just after the bite. But the great difference between the Schulte scheme and the patent consists in this. The drying rolls are only in pairs and not in stacks. There was therefore no problem of continuous in and out winding. The threading being merely a first threading was easy enough, what the patent dealt with was the tendency of the paper to stick to the upper roll. Further, in the Schulte device the paper is not impinged on the lower roll but is impinged on a carrying felt band, which straight away leads it off in another direction. The truth is, that the Schulte device only seems an anticipation if it is looked at in the light of the knowledge imparted by the Pope patent. If analysed, the argument is this: The Schulte device makes the paper impinge on the felt band. If the felt band were not there the paper would impinge on the lower roller, and then we know from the Pope patent how it would act. But this is really to interpret the earlier patent in the light of the knowledge given by the latter, which is just what must not be done. Their Lordships cannot therefore take the view that here there was any anticipation. The argument may be also put thus: Imray and Smith show that if you can have the paper made to cling round the periphery of the lower roll it will enter the next nip. Schulte shows that an arrangement of a "doctor" with air directed to the upper roll just after the nip will deflect the paper on to the felt. Remove the felt and it will be directed, as Schulte shows, on to the roller. And then Imray and Smith show that once clinging to the roller it will enter the next nip. This, however, is to make a mosaic. That is illegitimate. In the case of *British Ore Concentration Syndicate*

v. *Minerals Separation, Ld.* (1), Fletcher Moulton L.J. speaks thus: "It cannot be too carefully kept in mind in patent law that, in order to render a document a prior publication of an invention, it must be shown that it publishes to the world the whole invention, i.e., all that is material to instruct the public how to put the invention in practice. It is not enough that there should be suggestions which, taken with suggestions derived from other and independent documents, may be shown to foreshadow the invention or important steps in it. Since the date of the vigorous protest of James L.J. against such a 'mosaic' of prior publications, this has been a universally accepted and most salutary principle. It applies with exceptional force in cases where the alleged prior publications are the specifications of unsuccessful inventions which have accordingly never passed into public general knowledge but have rightly been forgotten."

The three patents granted to Pope himself may be very shortly dismissed. The first has to do with drying rolls and not with calender rolls. The paper is carried by an endless apron, and there is the device of a scraper or "doctor," together with a current of air to blow the paper on to the apron. It is, of course, clear that the course of the paper is really directed by the endless apron which passes below the rollers. The second has to do with the removing of the paper from the pressure roll to the felt band. It does this by an air blast tangentially applied to the roller. Comment is unnecessary. The third has to do with the same problem, and although the words used "Applicable to all stages of the machine when removal is desired" would include the original entry to the calender rolls, it evidently does not deal with the problem of the calender rolls themselves, and the method employed is by opposing currents of air. This is far from the present patent. The result is that, in their Lordships' view, no anticipation has been proved.

At the same time, their Lordships fully recognize that the judgments below were not based on anticipation but on want of novelty or want of invention. The argument is this—

(1) (1909) 26 R. P. C. 124, 147.

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" doctors " or scrapers were admittedly old, guiding paper by means of an air blast had also been disclosed, and the use of an air blast to help the " doctor " to detach the paper from a roll, which might be the upper roll in a calender stack, was also disclosed. It required, therefore, no real inventive ingenuity so to dispose the " doctor " and the air blast as to obtain the desired result. The first and obvious observation is that if it required no invention it was very odd that people were allowed to go on pinching their fingers for thirty-five years. Counsel felt this difficulty, and sought to explain it by the fact that the increased speed of the machines was modern. In truth, it did not need several pages of evidence and minutes of address to bring home the proposition that an operator would be more likely to pinch his fingers if the machine went fast than if it went slow. But the pinching happened with the old slow machines. Indeed, it was proved that pinched and maimed fingers were looked on as the symbol of a veteran workman. It must be remarked that in almost every patent for mechanical combination the elements are old. It must also be considered that there may be invention in what, after all, is only simplification. But here there is really more than that. The plan for separating the paper from the upper roll by means of a " doctor " and an air blast had been shown, but it had not been shown that by a particular arrangement of these two the paper would not only be separated from the upper roll, but induced to cling to the lower roll round about its adjacent periphery, so as to enter of itself into the next nip. After all, what is invention ? It is finding out something which has not been found out by other people. This Pope in the present patent did. He found out that the paper would so stick, and the practical problem was solved. The learned judges below say that all this might have been done by any one who experimented with " doctors " and air blasts already known. That is that some one else might have hit upon the invention. There are many instances in various branches of science of independent investigators making the same discovery. That does not prevent the one who first applies and gets a patent

from having a good patent, for a patent represents a quid pro quo. The quid to the patentee is the monopoly; the quo is that he presents to the public the knowledge which they have not got. That knowledge the other inventor has kept sealed in his own breast, and he therefore cannot complain that his rival got the patent. And if this is the case when a person can show that he actually made the discovery, surely that is a much stronger case than the present, when the objector does not say that he did discover, but only that if he had experimented he would have discovered. The real invention often may be and is just the last element of the combination. In his address last September to the British Association, Sir William Bragg described how the location of the German guns was discovered. The problem was to find out the exact moment at which the wind puff caused by the explosion arrived at the British lines. It was known that a wire electrically heated would if even slightly cooled show a changed resistance. Would a gun puff cool it? To an officer listening to the whistling noise which the gun puffs made in the fissures of his tent it occurred that it might. It was tried and it did, on which Sir William says: "It may be the last little adjustment that turns the scale, and the last step the one that counts." This had nothing to do with patents, for there was no manufacture, but analogously it accurately describes what may constitute invention. It may be the last step; and the last step here, the step that had not been tried by Imray and all the others, was taken by Pope in the present patent.

Having these views, it is clear that, in their Lordships' opinion, the learned trial judge misdirected himself. He arrived at the opinion that the invention was old by making a mosaic of other and prior descriptions. He also, in their Lordships' opinion, took quite an erroneous view as to an analogous user. Analogous user is what its name denotes, something which has to do with user. He has applied the doctrine not to things used but to things described. But as to things only described, there must either be anticipation or not. And anticipation must be judged by the canons

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already mentioned. Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations? The distinction between anticipation by prior description and by prior user is well understood. The doctrine of analogous user only applies to cases as to things in actual use. The leading case is the fishplate case: *Harwood* v. *Great Northern Ry. Co.* (1) That dealt with the question whether there could be a good patent for a fishplate on a railway where the same fishplate had been used on a bridge. Blackburn J., one of the consulted judges, who although he differed on the ground that he thought there was a real difference between the two fishes, yet concurred with all the others as to the law, states the problem thus (2): "In every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims that there is no invention in the differences." The contrivance, be it observed, must be a contrivance in use, not one merely described. Then there was the case of *Morgan & Co.* v. *Windover & Co.* (3), the C-spring case. Throughout the judgment analogous user is only applied to a known thing. In the words of Lord Halsbury (4): "The application of well known things to a new analogous use is not properly the subject of a patent."

Upon the whole matter their Lordships find that the judgments below cannot be supported. To do so would be to deprive the patentee of the fruits of what has been found a very practical and very useful invention. It has the outstanding merits of simplicity and success.

There were, however, two other defences which were pleaded, though in the view taken by the Courts below there was no need to deal with them. The first is the defence based on Canadian legislation. The date of the patent being 1919, the legislation current at that time was the revised statutes of 1906. Sect. 7 of c. 69, which is the Patent Act, is as follows: "Any person who has invented any new and useful art, machine, manufacture or composition of

(1) (1865) 11 H. L. C. 654.
(2) Ibid. 667.
(3) (1890) 7 R. P. C. 131.
(4) Ibid. 134.

matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention." Now, as to the facts, no use was proved except one, and that was by Pope himself at paper works in Maine, U.S. In fact it seems that it was there he practically applied the invention which he subsequently patented for the first time, and it was a complete success, where other endeavours had failed. Now, s. 7 has two parts. The first part " not known or used by any other person before his invention thereof " obviously could not apply, for if it was Pope who showed the people at the works how to do it, they could not do it before his invention. But then comes the second part, and the point is whether the public use is a use in Canada previous to the application for a patent, or whether it is public use anywhere previous to the application for a patent in Canada. It is worthy of remark that in the statute of 1872, which was replaced by the revised statutes of 1886, the comma comes after " application " and not after " Canada," and the words " for patent therefor" are omitted. Sect. 8 of the Revised Statutes Act, 1886 (49 Vict. c. 4), is as follows : " The said revised statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Act and parts of Acts so repealed, and for which the said revised statutes are substituted. (2.) But if upon any point the provisions of the said revised statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then, as respects all transactions, matters and things subsequent to the time when the said revised statutes take effect, the provisions contained in them shall prevail but, as respects

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all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

A similar provision appears with the revised statutes of 1906.

It is antecedently very improbable that it was meant really to alter the law by the displacement of a comma. The consideration, however, which determines the matter in their Lordships' opinion is that, considering that the whole section is dealing with an application for a Canadian patent, the addition of the words "in Canada," if meant to qualify the word "application," is quite pleonastic.

The question has been before the Canadian Courts and opposing decisions have been given. In *Smith* v. *Goldie* (1) the point was decided as their Lordships indicate, but in *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (2) the opposite result was reached. The argument, convincing to their Lordships, as to pleonastic use of the words "in Canada" was sought to be met by pointing out that in other sections the words "in Canada" were and are referable to the application for a patent. This seems to their Lordships to be duly met by pointing out that in the sections quoted they were called for by the necessities of antithesis, so that the argument from pleonasm did not truly arise. There is therefore no defence available under the statute.

There remains only the question of infringement. With this their Lordships have no difficulty. Infringement is denied, because in the apparatus used by the respondents the air jet inside the "doctor" was not directed straight against the upper roll, as in the patent, but was directed against the blade of the "doctor" itself, but having impinged upon the blade of the "doctor" it was eventually diverted to exactly the same place on the upper roll. It cannot be supposed that the patent being good can be escaped by such an obvious mechanical equivalent.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, to declare that the patent is good, and has been infringed, and to remit to the Canadian Court to

(1) 9 Can. S. C. R. 46. (2) 13 Ex. C. R. 186.

grant an injunction and to deal with the question of damages and other relative claims. The appellants must have their costs before this Board and in the Courts below.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

HUDSON'S BAY COMPANY . . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . } RESPONDENTS.

J. C.*
1928
Nov. 9.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Precious Metals—Crown Grant of Land—Lands granted to Hudson Bay Company—Construction of Deed of Surrender—Dominion Lands Act (35 *Vict. c.* 23, *Dom.*), *s.* 36.

By a charter of 1667 the Crown granted to the Hudson's Bay Company extensive territories together with the gold and silver therein, also rights and privileges whereby in effect the company possessed the royal prerogative in the territories granted. By a deed of November 19, 1869, the company surrendered to the Crown all the rights and privileges so granted, and all the lands within Rupert's Land, except and subject to a right to "retain" the posts and stations which it then occupied, a right to blocks of land thereto adjoining to be selected by the company, and a right to certain other lands to be claimed within the fifty years following. Pursuant to the deed the company received Crown grants of selected blocks, which grants included the posts and stations adjoining thereto, and Crown grants of lands subsequently claimed by the company:—

Held, that the precious metals in all the lands so vesting in the company belonged to the Crown. The grants to which the company was entitled under the deed were Crown grants of lands with those incidents which ordinarily attach thereto, and it is settled law that those incidents do not include the precious metals. The right to retain the posts and stations was an exception to the general surrender, and was to be construed

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* *Present:* LORD HAILSHAM L.C., LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, and LORD ATKIN.

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strictly against the company; the use of the word "retain" was insufficient to give the company rights which they had not in the adjoining lands included in the same instruments. The Dominion Lands Act, 1872, s. 36, whatever its effect, was not a provision that a grant of Dominion lands operated as a grant of the precious metals contained therein.

Judgment of the Supreme Court of Canada [1927] S. C. R. 458 affirmed.

APPEAL (No. 85 of 1927) by special leave from a judgment of the Supreme Court of Canada (April 20, 1927) upon a reference to that Court by the Governor-General under s. 60 of the Supreme Court Act of Canada.

The questions referred, which are fully set out in the judgment of the Judicial Committee, were whether the precious metals in various lands in the North-West Territories and in the Provinces of Manitoba, Saskatchewan, and Alberta, possessed by the appellants, vested in the Crown or in the appellants. No question was raised as between the Dominion and the Provinces should the precious metals be held to vest in the Crown.

The Supreme Court by a unanimous judgment reported at [1927] S. C. R. 458 held that, in respect of each class of land referred to in the questions, the precious metals vested in the Crown not in the appellants.

1928. July 2, 3, 5. *W. A. Greene K.C.*, *Laird K.C.*, *Hon. Geoffrey Lawrence K.C.* and *Bischoff* for the appellants.

L. Cannon K.C., *Geoffrion K.C.* and *T. Mathew* for the Attorney-General for Canada.

R. W. Craig K.C. and *Gahan* for the Attorney-General for Manitoba.

[Reference was made to *In re Earl of Northumberland's Mines* (1); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2); and *In re St. Eugene Mining Co.* (3)]

Nov. 9. The judgment of their Lordships was delivered by

LORD HAILSHAM L.C. This is an appeal by special leave from the answers given by the Supreme Court of Canada

(1) (1568) 1 Plowd. 310, 336. (2) (1889) 14 App. Cas. 295.
(3) (1900) 7 B. C. Rep. 288.

to certain questions referred to them under the provisions of s. 60 of the Supreme Court Act of Canada.

The agreed statement of facts and the questions submitted for decision were as follows:—

" 1. By letters patent granted by His late Majesty King Charles the Second, bearing date May 2, 1670, the Company was granted the lands and territories as therein described, also the gold and silver to be found or discovered therein and other rights, etc., the whole as more fully described in said letters patent.

" 2. By deed of surrender bearing date November 19, 1869, the company did surrender to Her late Majesty on the terms and conditions of the said surrender, and on condition of the said surrender being accepted pursuant to the provisions of the Rupert's Land Act, 1868, all the rights of government and other rights, privileges, liberties, franchises, powers and authorities granted or purported to be granted to the company by the said letters patent, and also all the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the company by the said letters patent.

" 3. The said surrender was duly accepted, and by order of Her late Majesty in Council, bearing date June 23, 1870, Rupert's Land and the Northwest Territories were admitted into the Dominion of Canada.

" 4. The company, pursuant to the said deed of surrender and Order in Council, retained all the posts or stations actually possessed and occupied by it or its officers or agents at the time of the said surrender, and after the acceptance of said surrender duly selected blocks of lands adjoining each of its posts or stations within any part of British North America, not comprised in Canada and British Columbia.

" 5. Since the said surrender was so made and accepted, the Crown, represented by the Dominion of Canada, has issued patents of the lands so selected adjoining each of its said posts or stations, and the said patents also included the land actually possessed and occupied by the company as posts or stations at the time of the said surrender.

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" 6. One of the terms and conditions of the said surrender was that the company might at any time within fifty years after the acceptance of the said surrender claim in any township or district within the fertile belt as therein described in which land is set out for settlement grants of land not exceeding one-twentieth part of the land so set out, the same to be determined by lot.

" 7. The Dominion Lands Act, c. 23, of the statutes of Canada, 1872, contains provisions relating to lands to which the company became entitled under such conditions in the said surrender. An Order in Council was passed by the Dominion Government on December 6, 1872, and the company on January 7, 1873, adopted the resolution, a copy of which is annexed.

" 8. The company has from time to time received title by notification of the surveys of townships and confirmation thereof to certain sections and parts of sections within the territory described as the fertile belt, and has also from time to time received title by patent from the Crown, represented by the Dominion of Canada, to other sections and parts of sections of land within the fertile belt, for the company's one-twentieth of the lands in fractional townships and in townships broken by lakes and in lieu of the sections or parts of sections allotted to the company found to be settled upon. None of the said patents so issued expressly refer to the precious metals or to any minerals.

" 9. At the request of the Crown, the company from time to time, before receiving title to sections or parts of sections of land to which it was entitled, relinquished and surrendered its rights thereto, and obtained patents for other lands in lieu thereof from the Crown. Neither the said surrenders nor the said patents contain any express mention of minerals.

" 10. The company, after having received title to sections and parts of sections of land within the said fertile belt, has from time to time, at the request of the Crown, conveyed to the Crown the said lands, and obtained patents from the Crown for other lands in lieu thereof. Neither the said conveyances from the company nor the said patents contain

any express mention of minerals, and the lands so patented to the company comprise lands both within and without the said fertile belt.

" 11. Therefore it is desired to refer for hearing and consideration to the Supreme Court of Canada certain questions which, for the sake only of convenience and not as intending to waive, release or affect any rights or claims of any party, are confined to lands in the area now included in the North-west Territories and in the provinces of Alberta, Saskatchewan and Manitoba, the said questions being as follows :—

" 1. In whom, after the acceptance of the said surrender and the passing of the said Order in Council of June 23, 1870, were vested the precious metals, gold and silver, in, under or upon the lands in the said area possessed and occupied at the date of the said surrender as posts or stations by the company, its officers or agents, whether in the Crown, represented by the Dominion of Canada, or in the company ?

" 2. In whom were vested the precious metals, gold and silver, in, under or upon the blocks of land adjoining the said posts or stations of the company and selected by the company, whether in the Crown, represented by the Dominion of Canada, or in the company : ' (*a*) Upon the selection by the company of the said blocks of land.' ' (*b*) Upon the issue to the company of the Crown patents for the said blocks of land ? '

" 3. In whom were vested the precious metals, gold and silver, in, under or upon the sections of land or parts thereof in the said fertile belt which were vested in the company by notification, upon such notification, whether in the Crown, represented by the Dominion of Canada, or in the company ?

" 4. In whom were vested the precious metals, gold and silver, in, under or upon the land granted to the company by letters patent from the Crown upon the issue thereof : ' (*a*) In satisfaction of the company's one-twentieth of the land in fractional townships, or in townships broken by lakes.' ' (*b*) In lieu of lands allotted to the company but found to be settled upon ? '

" 5. In whom were vested the precious metals, gold and silver, in, under or upon the lands granted to the company

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by letters patent in lieu of land in which the company relinquished and surrendered its rights to the Crown upon the issue of such patents ?

" 6. In whom were vested the precious metals, gold and silver, in, under or upon the land granted to the company by letters patent in lieu of land conveyed by the company to the Crown upon the issue of such patents ?

" 7. If in any of such cases the precious metals, gold and silver, were vested in the company, did the repeal of s. 37 of the Dominion Lands Act, 1879 (42 Vict. c. 31), by s. 6 (43 Vict. c. 26), or the enactment of s. 43 (46 Vict. c. 17), or of the Dominion Lands Act (7 & 8 Edw. 7, c. 20), or any other enactment affect the ownership of the said precious metals in such case ?

" 12. For the purpose of such hearing and consideration, the said Court may in addition to such other facts and matters as the Court may see fit, take into consideration the statements, facts and documents herein mentioned or set forth, and the statutes of the Parliament of the United Kingdom of Great Britain and Ireland, and of the Parliament of Canada, bearing upon such questions, and the fact that the company was not requested to consent to and did not consent to the amendment or repeal of any of the provisions of the Dominion Lands Act of 1872, and such other statements, facts and documents as may be submitted to the Court by order of the Governor in Council."

[The documents referred to in the statement were scheduled thereto.]

An Order in Council containing amendments, which are above incorporated, of the questions, declared as follows :—

" It is not intended by said reference to raise any issues as between the Dominion and any Province, and that so far as any lands in the Province of Manitoba are concerned questions numbers 1, 2 and 3 may be answered as if the words ' represented by the Dominion of Canada ' where they occur after the word ' Crown ' in each of said questions were struck out, and that in answering any of the questions referred it will be sufficient to state what are the rights of the Crown

and the company, respectively, without indicating whether any of the rights of the Crown are vested in the Dominion or the Province."

The Supreme Court of Canada answered the first six questions in favour of the Crown, and replied to the seventh question that the hypothesis of this question did not arise.

From the statement of facts it is apparent that the answers to the questions must depend primarily upon the construction to be placed upon the deed of surrender of November 19, 1869, and it is convenient to turn at once to the terms of that document.

The deed contained recitals that Her Majesty and the appellants had agreed "to terms and conditions upon which the said Governor and Company shall surrender to Her said Majesty, pursuant to the provisions in that behalf in the Rupert's Land Act, 1868, contained all the rights of government and other rights, privileges, liberties, franchises, powers and authorities, and all the lands and territories (except and subject as in the said terms and conditions expressed or mentioned) granted or purported to be granted by the said letters patent, and also all similar rights which have been exercised or assumed by the said Governor and Company in any parts of British North America not forming part of Rupert's Land, or of Canada, or of British Columbia, in order and to the intent that, after such surrender has been effected and accepted under the provisions of the last-mentioned Act, the said Rupert's Land may be admitted into the Union of the Dominion of Canada, pursuant to the hereinbefore mentioned Acts or one of them."

It stated that the terms and conditions "on which it has been agreed that the said surrender is to be made by the said Governor and Company (who are in the following articles designated as the company) to Her said Majesty are as follows (that is to say):—

"1. The Canadian Government shall pay to the company the sum of 300,000*l.* sterling when Rupert's Land is transferred to the Dominion of Canada.

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"2. The company to retain all the posts or stations now actually possessed and occupied by them or their officers or agents, whether in Rupert's Land or any other part of British North America, and may within twelve months after the acceptance of the said surrender select a block of land adjoining each of their posts or stations, within any part of British North America not comprised in Canada and British Columbia in conformity, except as regards the Red River Territory, with a list made out by the company and communicated to the Canadian Ministers, being the list in the annexed schedule. The actual survey is to be proceeded with, with all convenient speed. . . . .

"5. The company may, at any time within fifty years after such acceptance of the said surrender, claim in any township or district within the fertile belt in which land is set out for settlements, grants of land not exceeding one-twentieth part of the land so set out; the blocks so granted to be determined by lot, and the company to pay a rateable share of the survey expenses, not exceeding 8 cents. Canadian an acre. The company may defer the exercise of their rights of claiming their proportion of each township or district for not more than ten years after it is set out, but their claim must be limited to an allotment from the lands remaining unsold at the time they declare their intention to make it."

By the operative part of the deed the appellants surrendered to Her Majesty "all the rights of government, and other rights, privileges, liberties, franchises, powers and authorities, granted or purported to be granted to the said Governor and company by the said recited letters patent of His late Majesty King Charles the Second, and also all similar rights which may have been exercised or assumed by the said Governor and company in any parts of British North America, not forming part of Rupert's Land or of Canada, or of British Columbia, and all the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the said Governor and company by the said letters patent."

The appellants' main argument was that since the precious metals had admittedly been conveyed to them by the original charter of May 2, 1670, and constituted part of the lands in their ownership, it followed, firstly, that the posts and stations retained by the appellants must necessarily include the precious metals therein contained, and, secondly, that the expression "land" (articles 2 and 5 of the conditions of the surrender) must include the precious metals contained therein.

It is common ground that under the original charter the appellants were granted not only the land, but also the precious metals therein contained; and it is plain that the language of the deed of surrender is wide enough to include not only the land given up, but also the precious metals therein. But, in their Lordships' opinion, it by no means follows that when in the deed of surrender the appellants are given a right to a grant of "land" it is intended that the land so granted shall include precious metals. Under the original charter the appellants were constituted with the widest powers of government and administration throughout the territories which were handed over to them; they were in effect to possess the royal prerogative within these territories and to administer them with very much the same authority as is now conferred upon the self-governing parts of the Empire. This position was ended by the deed of surrender. The appellants were thereafter to cease to act as a governing authority and to become merely a trading corporation holding certain land for the purpose of carrying on trade or for sale.

It is settled law that a grant by the Crown of "land" does not confer upon the grantee any right to the precious metals contained in the land granted; and in their Lordships' view the provisions in the articles under which the appellants were to have the right to the grant of certain lands confers on them nothing more than the right to receive a grant of such lands with the ordinary incidents of such a grant and without the royal franchises which they had surrendered.

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There is no doubt a difficulty created by the use of the word "retain" with regard to the land upon which the posts and stations in the actual possession and occupation of the appellants at the date of the deed of surrender were situated. It is, however, to be observed that the right to retain these posts and stations is an exception from the general surrender contained in the document as a whole, and ought therefore to be construed strictly against the appellants. It is extremely improbable that the parties can have intended that the precious metals contained in the land immediately under the posts and stations should remain vested in the company whilst they lost all right to these metals in any of the other lands to which they had a right by virtue of the deed of surrender. The deed does not in terms give the right to the company to retain the lands upon which the posts and stations are situate, and in fact it appears from the agreed statement of facts that ever since the deed of surrender has been executed the method of carrying its provisions into effect has been for the Crown to make a grant to the appellants of the land upon which the posts and stations were situate as well as the adjoining ground selected under the provisions entitling the appellants to make such a selection. In their Lordships' view it would be unduly straining the importance to be attached to the use of the word "retain" in these circumstances to make the appellants' rights in the land under the posts and stations differ from their rights in the adjoining block granted by the same instrument. It follows that upon their main contention the appellants fail.

But the appellants had a subsidiary argument based upon the legislation of the Dominion. In 1872 the Canadian Parliament enacted the Dominion Lands Act of that year. The Act contains 108 sections, which are divided into separate groups with appropriate headings. Sects. 17–21 inclusive are headed "Lands Reserved by the Hudson's Bay Company." Sect. 17 recites article 5 of the terms and conditions of the deed of surrender, and recites an arrangement between the appellants and the Crown to simplify the selection of the

lands to which the appellants are entitled under that article, and ss. 18, 19 and 20 contain provisos dealing with special cases arising under the agreement.

By s. 21 it is provided: "As townships are surveyed and the respective surveys thereof confirmed, or as townships or parts of townships are set apart and reserved from sale as timber lands, the Governor of the said company shall be duly notified thereof by the Surveyor-General, and thereupon this Act shall operate to pass the title in fee simple in the sections or three-quarter parts of sections to which the company will be entitled under clause seventeen, as aforesaid, and to vest the same in the said company, without requiring a patent to issue for such lands; and as regards the lands set apart by lot, and those selected to satisfy the one-twentieth in townships other than the above, as provided in clauses eighteen and nineteen, returns thereof shall be made in due course by the local agent or agents to the Dominion Lands Office, and patents shall issue for the same accordingly."

Later on in the statute there come a series of sections headed "Mining Lands," and numbered 36–41 inclusive. Sect. 36 is as follows: "No reservation of gold, silver, iron, copper, or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands."

It appears from the minutes of the appellants, dated January 7, 1873, that the Act of 1872 and certain provisions contained in an Order in Council of December 6, 1872, were accepted by the appellants in substitution of the provisions contained in article 5 of the deed of surrender. The Act of 1872 was repealed and re-enacted, so far as the relevant provisions are concerned, in 1879 by the Dominion Lands Act of that year. By the Dominion Lands Act of 1883 the Act of 1879 was repealed; the clauses relating to the appellant company were re-enacted; but s. 36 disappears, and in lieu thereof it was enacted by s. 43: "It is hereby declared that no grant from the Crown of lands in freehold or for any less estate has operated or will operate as a conveyance of the gold and silver mines therein unless the same are expressly conveyed in such grant."

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The legislation remains in substantially the same position until 1908, when there was a revision and consolidation, in which s. 43 disappears.

The appellants' argument, based upon this legislation, was to the effect that by the Act of 1872 the appellants' right to receive a title in fee simple was expressly recognized in s. 21, and that by virtue of s. 36 the grant of the fee simple of land at that date operated to pass the precious metals contained therein, and that therefore the statute in effect recognized and enacted the appellants' right to receive grants of land carrying the right to the precious metals contained therein. This, it was argued, was a statutory bargain made between the appellants and the Crown, and no subsequent legislation could take away the rights thereby conferred upon the appellants, or, alternatively, the subsequent statutes must be construed as reserving these rights. Further, it was said that the Act of 1883, having been repealed in 1908, s. 43 of that Act had disappeared and created no obstacle to the appellants' arguments. In their Lordships' view this reasoning breaks down in its initial stage. Whatever may be the effect of s. 36 of the Act of 1872, it certainly does not amount to a provision that a grant of Dominion lands operates as a grant of the precious metals contained therein ; and it is not possible to hold that because s. 21 confirms the appellants' right to a title in fee simple to the land therein referred to, that therefore that title must be taken to include the title to the precious metals which had not been granted to the appellants.

This view renders it unnecessary to consider the effect of subsequent legislation to which attention has been called.

For these reasons, which are substantially the same as those which appear in the judgment of the Supreme Court of Canada, their Lordships are of opinion that the answers given by the Supreme Court were correct in every case, and that this appeal fails and must be dismissed with costs.

The Province of Manitoba was separately represented at the hearing before their Lordships' Board, but the interests of the Provinces and the Dominion were substantially the

same in the appeal, and their Lordships think that the appellants ought only to be ordered to pay one set of costs to the respondents.

Their Lordships will humbly advise His Majesty in accordance with this judgment.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for respondent, Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for respondent, Attorney-General for Manitoba: *Blake & Redden.*

[HOUSE OF LORDS.]

ANCHOR DONALDSON, LIMITED . . APPELLANTS; H. L. (Sc.)*

AND

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CROSSLAND . . . . . RESPONDENT.

Workmen's Compensation—Ending weekly Payments—Interim Award—Competency—Order for Payment into Court—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 12.

The employers of a workman who had been injured by accident admitted liability and paid him compensation, but they subsequently ended the weekly payments contrary to s. 12 of the Workmen's Compensation Act, 1925. Thereupon the workman applied for an arbitration claiming compensation at the former rate of payment on the ground that his incapacity continued, and moved for an interim award of compensation pending the final determination of the employers' liability. The arbitrator granted an interim award, but authorized the employers to pay into Court the compensation payable thereunder:—

Held, (1.) that the arbitrator was entitled to make an interim award to enforce the workman's right under s. 12 of the Workmen's Compensation Act, 1925, but was not entitled to authorize the employers to pay the compensation into Court.

Lindsay v. *Glasgow Iron and Steel Co.* 1925 S. C. 287 approved.

Ocean Coal Co. v. *Davies* [1927] A. C. 271 and *Niddrie and Benhar Coal Co.* v. *Dee* [1927] A. C. 299 discussed.

Per Lord Buckmaster: *Catton* v. *Ashwell & Nesbit* [1928] Ch. 484 is founded upon a misconception of *Ocean Coal Co.* v. *Davies* [1927] A. C. 271.

Decision of the First Division of the Court of Session in Scotland 1928 S. C. 187 affirmed.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, and LORD PHILLIMORE.

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APPEAL from a decision of the First Division of the Court of Session in Scotland (1) upon a case stated by the Sheriff-Substitute of Lanarkshire in an arbitration under the Workmen's Compensation Act, 1925.

On July 21, 1926, the respondent, while in the employment of the appellants, sustained injuries by accident arising out of and in the course of his employment. The appellants admitted liability, and paid compensation to the respondent at the rate of 1*l.* 9*s.* 9*d.* per week up to April 23, 1927, and offered to pay compensation at that rate up to April 27, 1927, but they had made no further payments since April 23. There was no award or recorded agreement relative to the payments of compensation. The respondent had not returned to work and the appellants had not served upon the respondent a notice under sub-s. 3 of s. 12 of the Workmen's Compensation Act, 1925.

On May 13, 1927, the respondent applied for arbitration, claiming an award of compensation at the rate of 1*l.* 9*s.* 9*d.* per week, or such less sum as might be found due as from April 22, 1927, on the ground that his incapacity was unchanged, and claiming also an interim award. On May 27, 1927, the appellants lodged their answer, in which they averred that the respondent had fully recovered as from April 27, 1927. On May 31, 1927, the respondent's procurator moved for an interim award of compensation.

The arbitrator found in law (1.) that under s. 12 of the Workmen's Compensation Act, 1925, the appellants were not entitled to end the weekly payments and that the respondent was therefore entitled to an interim award; and (2.) that the appellants were entitled to be authorized to pay into Court the amount of the interim award. He accordingly made an award ad interim against the appellants for payment of compensation at the rate of 1*l.* 9*s.* 9*d.* per week as from April 27, 1927, until the liability of the appellants should be decided in an award to follow thereon, reserving to the appellants the right to recover any payments made by them under the interim award in excess of the compensation for which they might ultimately be found liable; and he

(1) 1928 S. C. 187.

authorized the appellants to pay into Court any weekly payments due or to become due under the interim award.

The questions submitted for the opinion of the Court were :

(1.) In the circumstances above set forth was the arbitrator entitled to make an interim award of compensation to the respondent ?

(2.) In the event of the first question being answered in the affirmative, was he entitled to authorize the appellants to pay into Court instead of to the workman any weekly payments payable under the interim award ?

The First Division (the Lord President, Lord Sands, Lord Blackburn and Lord Ashmore ; Lord Blackburn dissenting on the first point) answered the first question in the affirmative and the second in the negative.

1928. June 25, 26. *Fenton K.C.* (of the Scottish Bar), (with him *James Stevenson* (of the Scottish Bar) and *G. Main Thompson* (of the English Bar)) for the appellants. Upon the first question, the workman's incapacity to earn wages as the result of an injury by accident arising out of and in the course of his employment is an essential condition of his right to receive compensation under the Workmen's Compensation Act, and the jurisdiction of an arbitrator to award weekly compensation is limited to the existence of the incapacity. It follows that where the dispute between the employer and workman as to the workman's incapacity has been submitted to arbitration the arbitrator is not entitled to grant an interim award of compensation until he is satisfied, after inquiry into the facts, that incapacity exists. The First Division, in deciding that the arbitrator had power to make an interim award of compensation, followed a previous decision of the same Court in *Lindsay* v. *Glasgow Iron and Steel Co.* (1) That decision is inconsistent with the opinions delivered in your Lordships' House in *Ocean Coal Co.* v. *Davies* (2) and *Niddrie and Benhar Coal Co.* v. *Dee.* (3) Sect. 12 of the Act of 1925 is concerned

(1) 1925 S. C. 287, 291, 294. (2) [1927] A. C. 271, 292, 297.
(3) [1927] A. C. 299.

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with the enforcement of a right, and has nothing to do with the arbitrator at all. The appellant relies upon the dissentient judgment of the Lord President in *Lindsay's* case, except in so far as he thought that s. 14 of the Act of 1923 (s. 12 of the present Act) had displaced *Gibson & Co.* v. *Wishart.* (1) To that extent his judgment has been overruled by this House in the *Ocean Coal* case. The proper course in this case was for the workman to record a memorandum of the agreement to be inferred from the payment of compensation to him by the employers and to charge on an extract thereof. [Upon this point he referred to *Traill & Sons* v. *Cochrane* (2); *Jones* v. *Great Central Ry. Co.* (3); *Binning* v. *Easton* (4); *Coakley* v. *Addie & Sons* (5); *Lochgelly Iron and Coal Co.* v. *Sinclair* (6); *Pearson* v. *Babcock & Wilcox* (7); and *Summerlee Iron Co.* v. *Freeland.* (8)] Secondly, assuming that the arbitrator had power to make an interim award for compensation, he had power to authorize the appellants to pay the money into Court. *Catton* v. *Ashwell & Nesbit* (9) supports the appellant's arguments on both points.

Craigie Aitchison K.C. (of the Scottish Bar) (with him *John Cameron* (of the Scottish Bar) and *Aitken Watson* (of the English Bar)) for the respondent. As to the first question, the object of s. 12 of the Act of 1925 was to preserve the status quo pending agreement between the parties or settlement by arbitration, and it entitles the workman to have the weekly payments continued except in the three cases therein specified, none of which applies to the present case. If the appellants considered it a hardship to continue the weekly payments while the question of the respondent's incapacity was in dispute they could have got rid of their liability by adopting the procedure prescribed in sub-head 3 of s. 12. If then the workman has a statutory right to the continuance of the weekly payments pending the final settlement of the dispute there must be some method of enforcing that right, and the most

(1) [1915] A. C. 18.
(2) (1901) 3 F. 1091.
(3) (1901) 18 Times L. R. 65.
(4) (1906) 8 F. 407.
(5) 1909 S. C. 545.
(6) 1909 S. C. 922, 929.
(7) 1913 S. C. 959.
(8) [1913] A. C. 221.
(9) [1928] Ch. 484.

convenient method of enforcement is by an interim award of compensation. *Lindsay's* case (1), which settled the question of the competency of interim awards for this purpose in Scotland, was rightly decided, and is not affected by *Ocean Coal Co.* v. *Davies.* (2) There the House was not concerned with the competency of an interim award pending the settlement of a disputed question of liability. The point of that case was that the capacity of the workman was admitted. As to the second question, *Niddrie and Benhar Coal Co.* v. *Dee* (3) does not apply. That case merely decides that an employer who has complied with the provisions of sub-head 3 of s. 12 and has applied to refer the dispute to a medical referee, is entitled to the protection afforded by proviso (ii.). In this case the arbitrator had no power to authorize the appellants to pay the compensation into Court. The effect of his order is to give the workman nothing which he had not before. If it were open to the employer to pay the compensation into Court in any case of disputed liability, why should the Legislature have authorized payment into Court in one case only—namely, where the employer has applied to refer the dispute to a medical referee ? Upon this hypothesis proviso (ii.) to sub-head 3 of s. 12 was unnecessary. "Expressio unius exclusio alterius."

Fenton K.C. replied.

The House took time for consideration.

Nov. 30. LORD BUCKMASTER. My Lords, the difficulty in this case lies far more in determining a question of procedure than a question of principle. The respondent was in the service of the appellants, and while in their employment on July 21, 1926, he sustained injuries due to an accident arising out of and in the course of his employment. As a consequence of his injury the appellants paid to the respondent a weekly sum of 1*l.* 9*s.* 9*d.* a week down to April 23, 1927, on which date they terminated the weekly payment. On May 13, 1927, the respondent applied under the Workmen's

(1) 1925 S. C. 287. (2) [1927] A. C. 271.
(3) [1927] A. C. 299.

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Compensation Act of 1925 for an award of compensation at the rate of 1*l.* 9*s.* 9*d.* per week as from April 23, 1927. This application was answered by the appellants alleging that the respondent's incapacity had ceased on April 27, 1927. At the time material for the present appeal the award in respect of that application had not been made, and the question of incapacity had not been determined, but on May 31, 1927, the arbiter made an interim award, awarding until the hearing that the appellants should continue to pay the compensation, reserving their right to recover any payments made under such award in excess of those which might be found due to the respondent in the final award, and authorized the appellants to pay into Court the sums due under that interim award. The appellants appealed to the First Division of the Court of Session against this award, and their Lordships affirmed the award upon the first point, but declared that there was no power to order payment of the amount into Court. From that judgment the appellants have brought the present appeal. The justification for the award is sought under the terms of s. 12 of the Workmen's Compensation Act, 1925, which is in the following terms :—

" *Limitation of power of employer to end or diminish weekly payments.*—An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases " (which are then specified under three sub-heads).

I do not entertain much doubt as to the meaning of s. 12. Its purpose is, to my mind, plain. It is to secure that if weekly payments are, in fact, being made to a workman, they shall not be ended apart from agreement or arbitration except in the cases that are specified. None of the occurrences mentioned in the three sub-heads is alleged in the present case, and it therefore follows that the obligation imposed by the first words of the section still remains. The case of *Ocean Coal Co.* v. *Davies* (1) and the case of *Niddrie and Benhar Coal Co.* v. *Dee* (2) do not, to my mind, affect this conclusion. In the first of these cases a workman was,

(1) [1927] A. C. 271. (2) [1927] A. C. 299.

by agreement, receiving from his employers compensation in respect of miners' nystagmus until September 3, 1925, when it was stopped upon the ground that the miner had completely recovered, and on September 21, 1925, they filed a request for arbitration upon this ground. The miner admitted that he had recovered, but claimed that by s. 14 of the Act of 1923, reproduced in s. 12 of the Act of 1925, the weekly payments could not be terminated until an award had been made under the Act. The county court judge made his award, holding that the respondent was entitled to compensation up to its date. His award was confirmed by the Court of Appeal, but overruled in this House, Lord Dunedin dissenting. The basis of this judgment was that there was no obligation to pay after incapacity had admittedly ceased, but it does not affect the question of the liability to pay during the period when the question as to incapacity is in dispute. Lord Wrenbury, in his judgment, stated (p. 294) that the rights under s. 14 were as follows: "It creates in the employer an obligation to pay de facto whether he is de jure liable or not until the liability de jure is determined." And Lord Carson said (on p. 297): "Pending an agreement or an arbitration, an employer is not entitled to end weekly payments under the Act of 1906, and probably if the employer, contrary to the section, did end such payments the workman would be entitled to put the law in motion to recover such payments, and the Courts would have power to insist upon such payments, either to the workman or, if the interests of justice so required, into Court, pending the determination of the arbitration."

These two statements are precisely applicable to the case that has happened here. No award has been made, and pending the making of the award, or an agreement, the employer is not at liberty to suspend the weekly payments. The later case does not affect the principle of this decision. In that case an award had been made under the statute and recorded in the Register of the Sheriff Court. Payments were made under it until a date when they were stopped. A dispute arose as to the cessation of the workman's incapacity,

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and the employers applied to refer the dispute to a medical referee. This application was refused on the ground that the matter ought to be settled by arbitration, for which the appellants applied. The workman charged the employers for arrears of compensation; the employers raised an action of suspension of the charge and consigned the sum into Court. It was held that the suspension ought to be allowed. The real foundation of this judgment was that an application had, in fact, been made to refer the dispute to a medical referee, and consequent upon that, payment into Court might be directed by virtue of what is now s. 12, sub-head 3 (ii.), and that the right of payment into Court was not defeated because other proceedings were taken. In the words of Lord Wrenbury (p. 310): "Sect. 14 (*c*) (ii.) applies when application has been made, whether an order has been made upon it or not. The application may or may not result in an order. The enactment applies none the less just as if there were inserted after the words 'to a medical referee' the words 'which may or may not result in a medical reference.'"

This decision leaves the present case unaffected. No one of the statutory conditions has been met, no award has been made, and no application for reference to a medical referee. The right of the workman, therefore, for the continuance of the payments remains. The next question is: How is this right to be enforced?

Lord Carson, in the *Ocean* case (1), appeared to think that independent common law proceedings might be used. It might, of course, also be possible to record an agreement under which the payments were made and to charge upon it, but payments of this kind are not necessarily made under any defined agreement, and in such a case it would have to be established by inference from a course of conduct, and prolonged investigation might ensue during which time the payments, of which it was the object of the Act to secure continuance, would have ceased. I cannot think that this was the real meaning of the Act. The question of the

(1) [1927] A. C. 271, 297.

workman's right to compensation was expressly taken outside the Courts and placed in the hands of an arbitrator. He it is in whom is vested the right of awarding the compensation, and this, in my opinion, gives him seisin of the dispute relating to the payment of compensation. This right to the continuance of the weekly payments is associated with that claim for compensation, and by the Act is to be continued until the legal rights of the parties are determined, or the payments ended by the statutory means. Where arbitration proceedings are pending, the enforcement of the workman's right under s. 12 must necessarily be ad interim, pending the award, and if independent proceedings were taken to enforce the right, such proceedings here would in the ordinary case be before the county court judge and (I apprehend) in Scotland before the Sheriff-Substitute—in other words, before the very arbitrator who has charge of the dispute. It seems to me impossible that in such circumstances the jurisdiction could only be invoked by outside process and not by application in the arbitration itself. In Scotland, from which this appeal proceeds, it is stated that this has been the habitual practice since 1923, and has been confirmed by a judgment of the Court of Session in the case of *Lindsay* v. *Glasgow Iron and Steel Co.* (1) I do not think that this is a peculiarity of Scotch procedure. I think it is inherent in the Act, and to decide otherwise would mean that, in a statute based upon the principle that arbitration and not the usual proceedings in the Courts should be the means of settling disputes, an interim matter in the arbitration is to be settled by those very Courts, the authority of which has been excluded.

I think, therefore, the arbitrator was right in making the interim award, but I do not think he had any power to order payment into Court, for this can only be done when the procedure under sub-head 3 has been set on foot, and no such procedure was resorted to in the present case.

It is true that Lord Carson, in the *Ocean* case (2), contemplated that if proceedings at common law were undertaken, an order might be made for payment into Court; but this

(1) 1925 S. C. 287. (2) [1927] A. C. 271, 297.

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statement was clearly outside the real ground of the decision and was not directed to the point that arises here. In my opinion the object of the Act was to secure payment to the workman while matters were unsettled, and this is not accomplished by payment into Court. There is only one case in which payment into Court is expressly sanctioned, and this affords confirmation of the view that it is negatived in every other instance.

It is true also that in the case of *Catton* v. *Ashwell & Nesbit* (1) the Court of Appeal took a different view of the meaning of the *Ocean* case. In that case, pending an arbitration, the employer, alleging that the workman's incapacity had ceased, applied under s. 11 for a review, and paid into Court the weekly moneys at the rate he had formerly been paying, and the workman took independent proceedings under s. 22. The Court of Appeal (affirming Clauson J.) held that the action was ill-founded. The judgment of Clauson J. appears to be based on the view that the workman's right depended upon proved continuing incapacity, and that this had not been established, and this view appears to find support from Sargant L.J.; but in my opinion this is not the meaning of the Act. Lawrence L.J. said that the employers had never claimed to end the payments otherwise than in pursuance of an arbitration, and had paid the money into Court under the rules. If the rules were based on a true interpretation of the statute this conclusion would be unexceptionable, but in my opinion the statute does not permit such payment and its provisions cannot be extended by rules.

In my opinion this appeal should fail.

LORD PHILLIMORE. My Lords, when a workman has been injured by an accident for which the employer is liable to make compensation and a figure has been arrived at for the weekly payment, if for any reason the employer makes default, there is a summary procedure provided by which the workman can get his money. If the payment is due under an award,

(1) [1928] Ch. 484.

the award is like any other order of Court upon which execution can issue, to use the English phrase, or a charge can be made upon an extract of the award, to use the Scotch one. If there is no award but a written agreement, the agreement can be registered, and becomes like an award. If there is no written agreement but only an oral one to be inferred from the fact of previous payments, a memorandum of this oral agreement may be drawn up and registered.

Now there comes, or may come, a time when the disability of the workman due to his accident ceases, or partially ceases, and when the weekly payment should wholly or partially cease also. If the employer thinks that this time has arrived, but the workman denies that it has arrived, a procedure has been established by which this question can be decided. But pending this decision, what is to happen as to the periodical weekly payment? If the employer is to continue making it, and it turns out that he need not have made it, he will have a poor chance of getting his money back. If the workman ought to have had it and does not get it, he will have been subjected to serious hardship. In these circumstances the Legislature has decided that it would be the lesser of two evils if the workman (though he was found in the end not to be entitled to them) continued pendente lite to receive his weekly payments. But he receives them provisionally only, and, as it were, as a holder of the money in medio till the matter is determined. And if it should be determined that his disability had ceased or had partially ceased, he is liable to return the money. That he has no right to it except provisionally, and none at all as soon as it appears that his disability has ceased, and incidentally that if he has had it he must repay it, was decided by this House in the case of *Ocean Coal Co.* v. *Davies.* (1)

Inasmuch, however, as he is entitled to his weekly compensation pendente lite, a default by the employer in so paying him is like any other default, whether due to carelessness, temper, difficulty in finding of money, or any other cause, and entitles the workman to issue execution, to use the

(1) [1927] A. C. 271.

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English phrase, or to charge upon an extract of the award, to use the Scotch one.

For the sake of accuracy, and in order to complete this statement of the law, I should mention that under s. 12 of the Act there may be an intermediate course taken by which the employer disburses the weekly payment, but instead of paying it to the workman pays it into Court or consigns it. For this purpose he must use the procedure in sub-head 3 and obtain a medical certificate. It is important to notice this because of its bearing upon the *Niddrie* case (1), to which I shall refer later.

In the case now before your Lordships I see no reason why the simple course was not taken. It is true that there was no formal or written agreement between the workman and his employers, but there had been the payment and receipt of weekly compensation, which of itself implies an agreement; and the natural step, it seems to me, would have been that the workman would have applied to the Sheriff-clerk to register a memorandum of agreement, as suggested in the cases of *Cochrane* v. *Traill & Sons* (2); *Traill & Sons* v. *Cochrane* (3); and by the Lord President in *Lindsay* v. *Glasgow Iron and Steel Co.* (4), and then to charge upon the registered agreement, which has the force and effect of an award.

Instead of doing this the workman treated the matter as if he were beginning de novo, applied to the Sheriff for an award of compensation suggesting the rate at which he had been paid weekly, and alleging that he still remained incapable. Thereupon there was quite an elaborate hearing before the Sheriff, arbitration applied for, answers lodged, motion for an interim award and a considered judgment, by which the workman arrived, at the end of a somewhat long road, through the intervention of the Sheriff-Substitute, at the same point and no further than he would have got if he had registered his memorandum of agreement with the Sheriff-clerk.

The reason may have been a fear that under the supposed authority of the case of *Niddrie and Benhar Coal Co.* v.

(1) [1927] A. C. 299.
(2) (1900) 2 F. 794.
(3) 3 F. 1091.
(4) 1925 S. C. 287.

Dee (1), decided by your Lordships' House, the employer might get a sist upon consignation and so deprive the workman of his present weekly payment. If this be the reason for the, as it seems to me, unnecessarily elaborate, costly, and anomalous proceeding, for which I find no warrant in the statute or rules, which was taken on behalf of the workman, I think the fear was ill-founded. I regard *Niddrie's* case (1) as wholly exceptional and depending on its peculiar features. There had been an inception of proceedings under sub-head 3 of s. 12 for a medical reference, and the House was of opinion that what had taken place in this direction was sufficient to take the case out of the ordinary lines of the statute and create a special relation between the workman and the employer, which warranted an application dehors the statute for a sist upon consignation.

It is unnecessary and would be improper to inquire whether every one would take the same view of the facts which was taken upon that occasion in your Lordships' House. It is enough that it was so taken, and, this being so, the case is no authority for importing into the provisions of the Act a procedure by way of sist upon consignation in cases where the Act provides no such procedure. I take the same view of *Niddrie's* case (1) and the *Ocean* case (2) as is taken by the noble Lord, Lord Buckmaster.

My Lords, I suppose that the workman was entitled, if the employer failed to comply with the informal agreement which he had made, to treat it as non-existent, and apply to the Sheriff, as arbitrator, in an original proceeding. I gather that by the law of Scotland an arbitrator has, by mere virtue of his office, the power of making awards ad interim ; though there is no such express power given to him or to any arbitrator acting under the statute. Putting these considerations together, the result may be that the interim award made by the Sheriff in this case may stand. He, however, made his award subject to the condition that the money should be paid into Court. I do not at the moment see precisely how the Court of Session got jurisdiction to interfere with an order which he made,

(1) [1927] A. C. 299. (2) [1927] A. C. 271.

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not in virtue of any provision in the Act or rules, but in virtue of a power given to every arbitrator by the common law of Scotland. However, as I have already stated, the result was satisfactory.

I have thought it necessary to subject this procedure to a somewhat detailed analysis, because I have been thinking of the English workman who will have to use a procedure to which the Scotch law of arbitration will not apply. I am not aware that an English arbitrator has the power of making an interim award, or, at any rate, such an interim award as that made in the present case. The English workman, I conceive, if well advised, will take the course adopted or recommended in the three Scotch cases which I have quoted, for which, I may add, provision seems to be made by rules 11 and 12 of the Act of Sederunt, which regulate the statutory procedure in Scotland, and which have, I imagine, an analogy in the English rules.

For the reasons which I have given I do not dissent from the conclusion that this appeal should be dismissed.

VISCOUNT DUNEDIN. My Lords, this case has given me more than usual anxiety, not because of doubts in my own mind as to what the judgment should be, but because I have a natural feeling that any criticisms which I may make on the judgments of the noble Lords in the *Ocean* and *Niddrie* cases may savour of a wish not to reconcile myself to the judgment in which I was a dissentient party. I do not need to recapitulate the facts of the case which have been set out with perfect accuracy by the noble Lord on the Woolsack. As regards the judgments of the learned judges of the First Division, I entirely concur with the very able and comprehensive judgment of Lord Sands. I also concur with that of the Lord President, except upon one point, which I shall hereafter explain. As, however, the present case will undoubtedly be quoted in English cases where the learned judges have not easy access to the Scotch reports, I should like to quote in extenso a very valuable part of the judgment of Lord Sands. (1)

(1) 1928 S. C. 200.

" Before parting for what, unless past experience belies me, will be but a brief season, with s. 12 " (s. 12 of 1925 is equivalent to s. 14 of 1923), " I venture to remark upon two practical considerations which, I think, are sometimes lost sight of in the study of this section. The first consideration is that, from the point of view of an employer, the right, if such right exists, to recover in the long run the amount of any payments made to a workman is of little practical value. The perhaps difficult question of whether or how such sums may be recovered is one of juridical interest only. The second consideration is that, from the point of view of the ordinary workman, the value of consignation is almost negligible. The insolvency of an employer is, save in rare cases, not a contingency the prospect of which disquiets the workman. He relies with confidence on his money in the long run if he wins his case, but what he is immediately concerned about is not recovery in the long run, but payment of present aliment ; and consignation does not give him that. I venture respectfully to think that this consideration is somewhat overlooked in certain dicta to which we have been referred, where it seems to be taken that justice must always be fully satisfied and every reasonable claim of the workman be fully met by consignation. The present case is an apt illustration of the value of consignation from the workman's point of view. The only benefit which the workman will take, if the finding of the arbitrator stands, from his application for an interim award, the procedure thereby entailed and the incurring of the risk of a stated case to this Court, and possibly an appeal to the House of Lords, is that he will be able to sleep at night without disquieting dreams as to the insolvency within the next few months of the Anchor Donaldson Company. It is a hardship to an employer to have to make payment to a workman who may ultimately be found to have recovered. On the other hand, it is a hardship to a workman who may ultimately be found not to have recovered to have his aliment suddenly withdrawn."

Lord Sands is too respectful to mention names, but I think it is quite clear that this is meant as a tonic to the not unnatural

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depression of a workman who reads the pronouncement of Lord Shaw that ample and satisfying justice is done to him and the purposes of the 1923 Act fulfilled if he gets consignation in Court of the money which the employer has at his own hands ceased to pay him, and he is left without other resources to await the result of an arbitration when it may be weeks or months before it is decided.

I do not, however, linger longer with the judgments of the Court of Session for this reason. There is no question that upon the competency of an interim decree they were bound by their own decision in the case of *Lindsay* v. *Glasgow Iron and Steel Co.* (1) and other cases quoted by Lord Sands, if only those decisions had not been impliedly overruled by the decisions of this House in the subsequent cases of *Ocean* and *Niddrie*. The learned judges, with the exception of Lord Blackburn, have already stated that they were not so overruled. The real question, therefore, is what view your Lordships take of the *Ocean* and *Niddrie* cases.

Now, as to the *Ocean* case (2), two remarks are obvious. It could not deal directly with the question of the competency of an interim decree, because no such decree had been pronounced, nor, in argument, was such a decree even hinted at in that case. Secondly, so far as the actual judgment is concerned, all that was decided was that an arbitrator could not grant compensation for a period after a date at which the workman had admitted that recovery had taken place; for, be it observed, there was not only the solicitor's letter—"You need not lead evidence since we admit our client is no longer suffering from nystagmus," an expression which might only refer to the time of writing—but Lord Shaw expressly says (on p. 285) that on the date of the de facto stopping of payment the workman had recovered. That is the cardinal point. Lord Wrenbury also says (p. 291) that it was admitted further before the county court judge that on September 3 the respondent had recovered. The case where the workman makes no admission, but on the contrary stoutly denies, that he had recovered, was not, and could

(1) 1925 S. C. 287. (2) [1927] A. C. 271.

not, be dealt with in so far as the judgment is concerned. There are, however, the expressions of opinion in the case. Now, as clearly pointed out by Lord Buckmaster, Lord Wrenbury, after pointing out that payment de facto and the liability to make payment are distinct things, says (p. 292): "A statutory provision that the employer shall not be entitled to end or diminish a weekly payment is a provision that the employer shall de facto continue to pay but not necessarily that his liability to pay is thereby enlarged. It may be nothing more than an enactment that until the question whether his liability to pay is a continuing liability or not is decided he shall go on paying de facto, and that if it shall be decided that he was not under a continuing liability he shall be left entitled to recover. In my opinion this is the effect of the section." It is quite true that this does not square with the dictum of Lord Atkinson. Lord Atkinson says (p. 284): "I think it is clear that the object of this provision was to deprive the employer of the power or right, to which he was theretofore entitled, arbitrarily, at his own will and pleasure, to end or diminish the weekly payment. Under this section he may still terminate the weekly payment if, in the doing of that, he acts 'in pursuance of an agreement or arbitration.'" With great deference to Lord Atkinson, to my mind this dictum is quite unintelligible. The prior right existing to end or diminish must either refer to the right to end or diminish a payment de jure or de facto "to which he was theretofore entitled." He never was entitled to end a payment de jure. As to a payment de facto, which also he was never entitled to end at his own hand, but which he could end, the very case allowed him to do it, provided that it should be found in pursuance of an arbitration that he was right as to the recovery. But an employer who ends the payment at his own hand does not go to arbitration; it is the workman who, finding his money stopped, invokes arbitration. To hold that an employer who is brought into that arbitration as a defendant has stopped antecedently the payment in pursuance of arbitration, is a proposition that I cannot comprehend.

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Your Lordship in the chair has quoted Lord Carson's words. Lord Shaw did not assign any practical virtue to the Act of 1923 except as to the proceeding under which the employer could apply for a medical referee. I am therefore of opinion with your Lordships that the *Ocean* case (1) does not decide anything as to a case where the employer stops payment at his own hand and the workman persists in denying recovery.

Then as to the *Niddrie* case. (2) Here I freely confess the only help to the view that it impliedly overruled the quoted cases is in my own judgment. I thought that the disagreement with my judgment in the *Ocean* case went the whole length of saying that the Act of 1923, s. 14, had accomplished nothing, but that was not the view of the other members of the Court. They all put the judgment on the ground that there had been inception of a proceeding under s. 14 (*c*) (ii.) to invoke a medical referee, and that that authorized consignation in a separate process with the concomitant right of stopping execution.

I should like to say in passing that I think wondrous little attention was paid to the fact that the whole of the proceeding under s. 14 (*c*) (ii.) can only be started if the employer has been able to secure a medical certificate that the man has recovered. Whereas here he had no medical certificate and settled the matter on his own opinion, no proceeding under sub-s. (*c*) (ii.) was possible. The result, therefore, and I understand your Lordships to agree, is that when the employer stops payment at his own hand without a medical certificate and when the workman makes no admission of convalescence, the question as to what is to happen is still, so far as this House is concerned, open.

As I have already stated, the competency of an arbiter pronouncing an interim award has been in several cases affirmed by the Court of Session. At common law I have no doubt that a Scotch arbiter has an inherent power of making interim awards. Though not actually decided, the expressed opinions of Lord President Boyle and Lord Mackenzie in the

(1) [1927] A. C. 271. (2) [1927] A. C. 299.

case of *Lyle* v. *Falconer* (1) are sufficient to uphold the view; but the decisions of the Court of Session in the cases which they followed were not put upon the common law but rather on the obvious meaning of s. 14 of the Act of 1923 or its equivalent, s. 12 of 1925. It is also the view expressed by your Lordship on the Woolsack, and with that view I agree. The arbiter, however, still remains a Scotch arbiter, and by the law of Scotland a final decree always can and must control an interim decree. As it is expressed in the standard work on arbitration by the late Mr. Montgomerie Bell: "An interim decree, though delivered, is inherently subject to recall or alteration by a final decree."

It is here that I reach the point where I disagree with the learned Lord President, and where I find a solution to the doubt that has assailed some minds. The Lord President thinks that once money was paid under an interim decree there would be no possibility of legally recovering that money. I have carefully perused the various reports of this case in the Scottish Courts, and I do not find that a case was mentioned by counsel or adverted to by judges which my older memory has served to recall. I refer to the case of the *Edinburgh and Glasgow Ry. Co.* v. *Hill.* (2) In that case the railway company, which wanted land belonging to Hill, had entered into a submission with him to an arbiter to determine the value of the land to be taken. The arbiter, after inspection of the ground, issued an interim decree for 1750*l.*, but the railway company raised a reduction of this award, alleging it was grossly excessive; at the same time they paid the money in order to secure immediate entry. The Lord Ordinary simply dismissed the action, but the Inner House (Lord President Hope and Lords Gillies, Mackenzie and Fullerton) while agreeing that, there being no averment of corruption, there was no ground for reduction, yet recognized that it was possible that the final award after the arbiter had had a regular proof as to value, might be less than the sum awarded by the interim award, and pronounced this interlocutor: "In respect that the sum awarded in the interim decree has been

(1) (1842) 5 D. 236. (2) (1840) 2 D. 486.

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paid, but may be found ultimately to exceed the sum to be awarded in the final decree, supersede further consideration of the case till the arbiter shall have investigated the facts, and is prepared finally to fix the amount of the damages."

Personally, I consider that if the arbiter in a final award found the sum due to the workman less than what he had already got under the interim award, such a finding alone, with due reference to the interim award which would be recalled, would found a good petitory action for repetition; but in any case it would be simplicity itself to add a reductive conclusion, and then the case would be on all fours with *Edinburgh and Glasgow Ry. Co.* v. *Hill.* (1) This, however, is Scotch law, and this is a Scotch case. What is to happen in an English case? Lord Wrenbury has expressed an opinion in favour of the right to recover. I do not propose to give any opinion without the question being argued. The Scotch and English law on the question of the recovery of payments made is not the same. Those who have the time and the curiosity to wish to know more had better read first the judgment of Lord Sumner and then my own in *Sinclair* v. *Brougham* (2) and then compare *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Co.* (3) with *Chandler* v. *Webster.* (4) Those who have not, may take it from me that they are very different. I do not think it expedient to express an opinion in this action.

As to the question of consignation, I have no doubt that the unanimous opinion of the learned judges below is right. Once settle that the interim decree is in obedience to s. 12 (equivalent to s. 14 under the 1923 Act), then consignation is only allowed if the proceedings under sub-head 3 are taken, and they were not taken here. "Expressio unius est exclusio alterius." An arbiter has no common law power of ordering consignation.

I am afraid I do not agree with my noble friend Lord Phillimore as to the expediency in this case of the workman seeking to register a memorandum. If he had sought to do so, all that would have happened would have been that the

(1) (1840) 2 D. 486.
(2) [1914] A. C. 398.
(3) [1924] A. C. 226; 1923 S. C. (H. L.) 105.
(4) [1904] 1 K. B. 493.

employer would have objected, and presented a petition to the Sheriff to declare that the man had recovered. In these circumstances the Sheriff-clerk would not have rejected the memorandum de plano, but would have remitted to the Sheriff. In other words, all the procedure would have been round about instead of at once getting at the point, as the workman did by going straight to the Sheriff. I concur in the motion made by the noble Lord on the Woolsack.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 30, 1928.

Solicitors for the appellants: *Botterell & Roche, for Fyfe, Maclean & Co., Writers, Glasgow, and Blackstone, Rose & Co., S. S. C., Leith, Edinburgh.*

Solicitors for the respondents: *Savage Cooper & Wright, for Frank Conway, Glasgow, and Lindsay C. Steele, Edinburgh.*

Applied. In re YOUNG, DECD. [1951] 1 Ch. 344

[HOUSE OF LORDS.]

pplied. Re YOUNG (decd.). [1950] All E.R. 1245.

L. (E.)* BLACKWELL AND ANOTHER . . . . APPELLANTS;

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AND

L. 24.

BLACKWELL AND OTHERS . . . . . RESPONDENTS.

Will—Codicil—Legacy on secret Trust—Detailed verbal Instructions by Testator to one of several Trustees—Written Memorandum on same Date as Execution of Codicil—Knowledge and Acceptance of Trust by all Trustees—Admissibility of parol Evidence—Validity of Trust Legacy.

A testator by a codicil to his will gave to five persons 12,000*l.* upon trust to invest the same as they should think fit, and apply the yearly income "for the purposes indicated by me to them," with power to pay over the capital sum of 8000*l.* "to such person or persons indicated by me to them" as they thought fit, and to pay the balance of 4000*l.* to the trustees of his will to be held as part of his residuary estate. Detailed parol instructions for the codicil were given by the testator to C., one of the five trustees, and the object of the trust was known in outline to and accepted by all the rest before the execution of the codicil. On the same day, soon after the execution of the codicil, C. wrote out and signed a memorandum of the instructions given to him to the effect (inter alia) that the interest of the 12,000*l.* was to be paid to a lady, whose name and full address were given, for the benefit of her and her son, whose full name followed. In an action by the widow of the testator and her son against the trustees and beneficiaries to test the validity of the trust legacy of 12,000*l.*:—

Held, that parol evidence was admissible to establish the trust.

In re Fleetwood (1880) 15 Ch. D. 594 followed.

Held, also, that a complete valid and consistent trust had been established by the codicil and the memorandum of even date.

Decision of the Court of Appeal [1928] Ch. 614 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Eve J.

The action was brought by the appellants, the widow and son of John Duncan Blackwell, the elder (hereinafter called "the testator"), as residuary legatees under his will and codicils, for a declaration that no valid trusts of a legacy of 12,000*l.* bequeathed to the respondents Mark Oliver, Arthur Ernest Harrison, Fred Wettern, Edward Watson

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, LORD BUCKMASTER, LORD CARSON, and LORD WARRINGTON OF CLYFFE.

(1) [1928] Ch. 614.

Barnett and William Percy Cowley by a fourth codicil to the testator's will were ever declared by the testator in favour of two other respondents, a lady and her son, an infant sixteen years of age, who were the beneficiaries under the trust legacy, or either of them, and that the legacy ought to be held upon the trusts declared by the said will and codicils of and concerning the testator's residuary estate.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Lord Buckmaster, and they are summarized in the headnote.

Eve J. held on the authority of *In re Fleetwood* (1) that the parol evidence adduced to prove the testator's declarations of the trusts of the legacy of 12,000*l.* was admissible, and that the codicil and a memorandum of even date of the respondent Cowley disclosed a complete valid and consistent trust of the legacy, and he dismissed the action; and the Court of Appeal (Lord Hanworth M.R., Lawrence and Russell L.JJ.) affirmed his decision.

1928. Oct. 30; Nov. 1, 2. *Sir Thomas Hughes K.C.* and *J. M. Easton* for the appellants. By s. 9 of the Wills Act, 1837, no will shall be valid unless it shall be in writing signed by the testator and attested in the manner therein mentioned. To admit parol evidence to explain what are the trusts of the will is directly contrary to the letter and spirit of the Act. There is one apparent exception to s. 9. A document not admitted to probate, if it is clearly identified by the description of it in the will and is shown to have been in existence when the will was executed, may be incorporated as part of the will: *Singleton* v. *Tomlinson*. (2) No further exceptions ought to be admitted. If the trust is in a written memorandum some protection is afforded, but if it is to depend on human testimony that protection is absent, and it was the object of the Wills Act to prevent that. There is one other apparent exception. Where a legacy is given to a man absolutely on the face of the gift, but he has been told by the testator the

(1) 15 Ch. D. 594. (2) (1878) 3 App. Cas. 404, 413.

. (E.) 29 CWELL WELL.

purposes for which he is to hold the money and expressly or impliedly agrees to abide by those instructions, then he is regarded as a trustee. The theory is that the legatee's assent is a promise by him to carry out the trust and that he is bound in conscience to fulfil it. In such a case parol evidence is admissible to prove (*a*) that the legatee is a trustee; (*b*) what are the terms of the trust: *McCormick* v. *Grogan*. (1) It was recognized that this doctrine, which was founded on personal fraud, involved a wide departure from the policy of the Wills Act and required to be restricted within proper limits. The so-called exception established by that case is not really an exception at all. The legatee does take the gift in accordance with the Wills Act, but then equity steps in and prevents him from committing a fraud; it fastens on his conscience and compels him to give effect to the trust. In that case, however, this House has said that this exception, if it is an exception, is not to be extended beyond the case of fraud, and their Lordships would appear to have thought that the malus animus must exist at the time of making the promise; but it is not necessary to go so far. That doctrine does not apply to a gift explicitly to trustees who are endeavouring to support the trust. Where the legatee is expressed to be a trustee no question of fraud arises, and the question becomes merely one between the cestui que trust and the residuary legatees. In such a case parol evidence is inadmissible to show what were the purposes indicated by the testator, and, in the absence of any other trust, the trust is for the residuary legatees. *In re Fleetwood* (2), which is opposed to the appellants' contention, is inconsistent with the principle of *McCormick* v. *Grogan* (3), and was wrongly decided. Hall V.-C.'s decision was founded upon an Irish case, *Riordan* v. *Banon* (4), which proceeds upon the erroneous view that the principle of *McCormick's* case (3)—that the Statute of Wills was not to be used as an instrument of fraud—applies to cases where the legatee is expressed to take as trustee as well as to cases where the gift is in form absolute.

(1) (1869) L. R. 4 H. L. 82, 89, 97.
(2) 15 Ch. D. 594.
(3) L. R. 4 H. L. 82.
(4) (1876) I. R. 10 Eq. 469, 478.

There can be no question of fraud where the person to whom the property is given is not setting up a title of his own. The cases under the Statute of Frauds cited by the Vice-Chancellor in support of his decision cannot be relied on as authorities upon s. 9 of the Wills Act, which is framed in different language. In *Crook* v. *Brooking* (1) the point whether or not the trust was well declared was not argued, and the only question was as to the construction of the letter disclosing the trust. In *Pring* v. *Pring* (2) it does not appear whether there was any serious dispute as to the admissibility of parol evidence, but it is an authority that, notwithstanding the Statute of Frauds, parol evidence might be admitted to show what the trust was. In *Smith* v. *Attersoll* (3) the executors had written out the trusts on which the property was to be held and the Court recognized the paper writing as a valid declaration of trusts. But the next of kin do not appear to have been parties, and that case carries the matter no further. In *Podmore* v. *Gunning* (4) the testator gave his estate to his wife absolutely "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease." At the present time that would not be read as imposing any legal obligation on the wife. The plaintiffs claimed to be beneficiaries under the trust. Shadwell V.-C. held on the facts that the plaintiffs had failed to prove their case, but said that they would have been entitled if they had. That is dictum only.

[LORD WARRINGTON. In *Cullen* v. *Attorney-General for Ireland* (5) Lord Westbury points out that "where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary."]

(1) (1688–89) 2 Vern. 50, 106.
(2) (1689) 2 Vern. 99.
(3) (1826) 1 Russ. 266, 276.
(4) (1836) 7 Sim. 644.
(5) (1866) L. R. 1 H. L. 190, 198.

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That is the true foundation of the doctrine of *McCormick's* case. (1)

[LORD BUCKMASTER referred to Lewin on Trusts, 13th ed., p. 60, ch. 3, sect. 3, para. 17.]

That passage is a very clear and cogent argument in support of the appellants' case. It shows that the Court only interferes in the case of fraud, and that where a trust results upon the face of the will the circumstance of an express or implied promise on the part of the devisee to execute a certain trust is not a sufficient ground for authorizing the Court to execute the trust as against the heir. For the purposes of the present appeal it is immaterial whether the gift is to a devisee or legatee. Mr. Jarman's opinion was to the same effect. In Jarman on Wills, 6th ed., p. 484, the editor, quoting a passage from the first edition, says: "As the law requires wills of both real and personal estates . . . . to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition." The passage goes on to say that "no principle connected with law of wills is more firmly established or more familiar in its application than this." The editor adds "Mr. Jarman, it is clear, would not have approved the decision in *Re Fleetwood* (2)", and he deals with that decision at p. 496. The same case is also criticized in Williams on Executors, 11th ed., p. 1224, where the following passage occurs: "In *Re Fleetwood* (2) Vice-Chancellor Hall held that one of the witnesses to the will being interested under the parol trust such interest failed, but if the trust was enforced not under the will but to prevent the Wills Act being used for fraud, the decision would seem difficult to support." In Theobald on Wills, 8th ed., p. 81, after a reference to (among other authorities) *Crook* v. *Brooking* (3), *Pring* v. *Pring* (4), *Riordan* v. *Banon* (5), and *In re Fleetwood* (2),

(1) L. R. 4 H. L. 82.
(2) 15 Ch. D. 594.
(3) 2 Vern. 50, 106.
(4) 2 Vern. 99.
(5) I. R. 10 Eq. 469.

the following passage occurs: "The doctrine of these cases appears to have been established before the Wills Act by analogy to the cases of incorporation of documents in wills, but it is difficult to understand how it can have been upheld since the Wills Act. That Act declares that no will shall be valid unless it shall be in writing; the cases decide, that a will may be valid, though it is partly in writing and partly not."

As to the cases since *In re Fleetwood.* (1) In *In re Pitt Rivers* (2) Vaughan Williams L.J. said that the Court never gave the go-by to the provisions of the Wills Act by enforcing upon any one testamentary intentions not expressed in the shape and form required by the Act, except for the prevention of fraud. But it was said in the Court below in the present case that the Court of Appeal had confirmed *In re Fleetwood* in *In re Huxtable.* (3) In that case no objection was taken to the admissibility of the evidence, and the only question was whether the charitable gift applied to the corpus as well as to the income. Farwell J., however, said he would have had some doubt about the admissibility of the evidence but for *In re Fleetwood.* (1) In the Court of Appeal *In re Fleetwood* (1) was not referred to, and again the question of admissibility was not argued, but Vaughan Williams L.J. said he had no doubt the affidavit was admissible to show what the purposes agreed upon were. That was dictum only, and cannot easily be reconciled with the dictum of the same learned Lord Justice in *In re Pitt Rivers.* (2) Even assuming that the point was decided by the Court of Appeal that decision is not binding on your Lordships. In *In re Hetley* (4) it was held that *In re Fleetwood* (1) had no application to a case where a power was given to a tenant for life to dispose of the property in accordance with wishes verbally expressed. In *Le Page* v. *Gardom* (5) both Lord Dunedin and Lord Parker kept an open mind as to the correctness of the decision in *In re Fleetwood* (1), and in *In re Gardner* (6) Warrington L.J.

(1) 15 Ch. D. 594.
(2) [1902] 1 Ch. 403.
(3) [1902] 1 Ch. 214, 216; [1902] 2 Ch. 793, 795.
(4) [1902] 2 Ch. 866.
(5) (1915) 84 L. J. (Ch.) 749, 752, 753.
(6) [1920] 2 Ch. 523, 532.

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(as he then was) also treated the question as open. Assuming that *In re Fleetwood* (1) was wrongly decided, as being in contravention of s. 9 of the Wills Act, has it been standing too long to be upset? That question is answered by the decision of this House in *Bourne* v. *Keane* (2), where a decision of eighty-five years' standing was upset. There is here nothing to show that the decision in *In re Fleetwood* (1) has ever become the foundation of any practice. Further, the trust is not effectually declared and is void for uncertainty. There is no definite trust of income for any particular period of time and no definite trust of the capital.

C. A. Bennett K.C. and *John Bennett* for the respondents. *In re Fleetwood* (1) is right both upon authority and upon principle. The principle of that decision—namely, that verbal or written instructions communicated by a testator to a legatee and assented to by him create an enforceable trust—has been accepted in Prideaux's Conveyancing, 16th ed., vol. ii., p. 535, and it is there expressly stated that the rule applies whether the will refers to the undisclosed trust or not. This rule is stated in general terms by Lord Davey in *French* v. *French*. (3) What creates the trust is the promise which the testator has taken from the person to whom the property is given. The power of the Court to execute the trust cannot depend upon the question whether the person upon whom the trust is imposed is or is not fraudulent. The inroad made upon the Wills Act may have been made in the first instance in the case of fraud, but it does not depend upon fraud. The Court will carry into effect all the terms of the trust which result from the promise given by the legatee, whether in form the gift is absolute or upon trust. For the purposes of this argument there is no material difference between the Statute of Frauds and the Wills Act, and therefore decisions under the earlier statute are relevant. *In re Fleetwood* (1) is supported by *Pring* v. *Pring* (4) and *Smith* v. *Attersoll* (5), which are decisions under the Statute of Frauds,

(1) 15 Ch. D. 594.
(2) [1919] A. C. 815, 874, 915.
(3) [1902] 1 I. R. 172, 230.
(4) 2 Vern. 99.
(5) 1 Russ. 266.

and by *Riordan* v. *Banon* (1), a decision under the Wills Act, and it has been acted upon by the Court of Appeal in *In re Huxtable*. (2) There the gift could only be carried into effect if the Court admitted parol evidence as to who the beneficiaries were on the basis of *In re Fleetwood*. (3) Ever since 1689 parol evidence has been held to be admissible in circumstances like the present to show what the terms of the trust are, and the Court has enforced the trust. *In re Fleetwood* (3) is also right on principle. A contrary decision making the jurisdiction of the Court depend upon the trustee being a fraudulent person would have led to an extraordinary inconsistency.

Sir Thomas Hughes K.C. replied.

[The following cases were also referred to: *Johnson* v. *Ball* (4); *Jones* v. *Badley*. (5)]

The House took time for consideration.

1929. Jan. 24. LORD BUCKMASTER. My Lords, the Lord Chancellor desires me to say that he agrees with the judgment that I am about to read.

The question raised on this appeal is one which in various forms has for over 200 years been the subject of vexed controversy. It may be stated by asking to what extent is it possible to give effect to testamentary intentions that are not contained in a written document duly executed as a will. That to some extent such intentions can be established even when orally expressed is not disputed.

If a testator in his will makes a gift to a named legatee who at the time of making the will has promised he will hold the benefit of the gift for certain defined and lawful purposes, the Court will enforce against the legatee the trust in promised obedience to which he received the gift: *McCormick* v. *Grogan*. (6)

This, however, does not directly govern the present case, as the following facts will show. The testator at the time of

(1) I. R. 10 Eq. 469.
(2) [1902] 2 Ch. 793.
(3) 15 Ch. D. 594.
(4) (1851) 5 De G. & Sm. 85.
(5) (1868) L. R. 3 Ch. 362.
(6) L. R. 4 H. L. 82.

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his death had a son of sixteen years, the child of a woman, also living, who was not his wife. He was ill for many weeks before he died, and was much concerned as to how he should make provision for this woman and her child without disclosing all the circumstances in his will.

He expressed his anxiety and his wish to the respondents Barnett and Wettern, who were his personal friends, and they agreed to act as trustees. What took place between them is best described in the words of Mr. Barnett, who said: "He was urgently desirous of effecting at once, or as soon as possible, what he had talked about to me for the preceding two years or so. He mentioned the two beneficiaries, the mother and the son, and the sum of 12,000*l*., and he also mentioned that it was his desire, if we would accept service, for my friend Wettern and myself, Mark Oliver, and Harrison, to act as trustees in a secret trust which he had proposed to effect, the legal side of which would be carried out by Mr. Percy Cowley of the Isle of Man. I agreed to act as a trustee." The testator, therefore, caused the respondent, W. P. Cowley, who had for some time acted as his solicitor, to be summoned. He arrived on February 13 and saw the testator alone, who gave him instructions to the above effect. These instructions he incorporated in a fourth codicil to the will. At his instance a Mr. Oliver was added to the trustees, and the codicil was then signed. It is in the following terms: "This is a codicil to the last will of me, John Duncan Blackwell. I give and bequeath to my friends, Mark Oliver, Arthur Ernest Harrison, Fred Wettern, Edward Watson Barnett, and William Percy Cowley the sum of twelve thousand pounds free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them with full power at any time to pay over the capital sum of eight thousand pounds to such person or persons indicated by me as they think fit, and to pay the balance of four thousand pounds to my trustees as part of my residuary estate, and upon the same trusts as are declared in my will and previous codicils."

Mr. Cowley then made a memorandum of the terms of the trust which has been accepted by Eve J. and the Court of Appeal as accurate. It is as follows :—

"Re Mr. J. D. Blackwell.

Memorandum of verbal instructions given to me at execution of codicil 13/2/25.

Income of 12,000*l.* to be paid to

(then there followed the name and address of the woman) or applied at discretion of trustees for benefit of herself and her son (mentioning him by name).

At any time trustees may pay over 8000*l.* of capital either to her or [her son] or both of them. In such event 4000*l.* is to go back to testator's trustees on same trusts as his residuary estate. W. Percy Cowley."

The testator died on June 3, 1925, and his will and four codicils were duly proved. The named trustees in the fourth codicil are ready and willing to carry out the trust evidenced by the memorandum, but the testator's widow and her son object that the trusts fail and contend that the trustees hold the 12,000*l.* as part of the residue. It is first argued that Mr. Cowley's memory is faulty so that his recollection cannot be accepted as to the actual terms of the trust, and further that if the terms in the memorandum are the true record, they are too vague to be enforced.

It is, in my opinion, unnecessary to add anything on these points to the judgment of Eve J. and the Court of Appeal. There can be no reasonable doubt about the accuracy of the memorandum, and none about its efficacy if it can be admitted in evidence.

The real difficulty lies in considering whether the fact that in the will itself it is made plain that the gift is fiduciary destroys the principle upon which verbal evidence has been admitted to show the nature of a gift purporting to be absolute and beneficial.

The argument in favour of the appellants on this point cannot be put more forcibly than in Lewin on Trusts, 13th ed., p. 60 (1), and its strength lies in this—that while in a beneficial

(1) The passage in the 13th edition is a repetition of a passage in the 8th edition, p. 64, for which Mr. Lewin was responsible.—H. B. H.

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gift the imposition of a trust does not contradict the terms of the will but merely adds to them, where the gift is made on trust and no beneficiaries are specified the trust operates either for the residuary legatees or the next of kin and heir at law, so that the admission of verbal evidence showing the trusts contradicts the will. It must be observed, however, that this reasoning in strictness applies to a case where land is devised to trustees on trust and nothing more is said, so that on the will there is a complete trust for the heir at law, but that is not the case here where the intention to benefit persons outside the will is manifest, and further a will is in fact contradicted when a gift complete made to a beneficiary without the hint of a trust is converted into a fiduciary gift for the benefit of some one never mentioned in the will. It is also urged that the underlying principle admitting extraneous evidence is that the legatee cannot profit by his own fraud, a principle that does not apply where, on the face of the will, his interest is fiduciary.

This principle is easily understood and may be also stated by saying that he cannot defraud beneficiaries for whom he has consented to act by keeping the money for himself. Apart, however, from the personal benefit accruing to the trustee, the real beneficiaries are equally defrauded in both cases, and the faith on which the testator relied is equally betrayed. Further, if the trustee was the heir or one of the next of kin or a residuary legatee, the fraud would be just the same. The counsel for the appellants seemed at one time to argue that in such a case and to such an extent as to defeat the beneficial interest of the trustee the outside evidence might be admitted, but it is difficult to see on what principle of reasoning the evidence can be admitted in the one case and rejected in the other, when in both cases the fact of the trust appears in the will itself. Again, in the case where no trusts are mentioned the legatee might defeat the whole purpose by renouncing the legacy and the breach of trust would not in that case enure to his own benefit, but I entertain no doubt that the Court, having once admitted the evidence of the trust, would interfere to prevent its defeat.

If this be so the personal benefit of the legatee cannot be the sole determining factor in considering the admissibility of the evidence.

It is, I think, more accurate to say that a testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust will be executed in favour of certain named persons, the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation, in fraud of the beneficiaries.

I now turn to the authorities to ascertain how far this question has been the subject of decision. These authorities go back for over two centuries, and the first striking fact is that in no single instance has any case been quoted that in terms supports the appellants' view, but there are numerous cases—some of long standing—against their contention.

The strongest statement in their favour is to be found in *McCormick* v. *Grogan* (1), where Lord Hatherley said: "But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform."

In that case, however, the present point was not argued and, as pointed out by Hall V.-C. in the later case of *In re Fleetwood* (2), the earlier authorities were not cited.

In the first case of *Crook* v. *Brooking* (3), decided by Lord Chancellor Jeffreys in 1688, the testator devised 1500*l.* to two people, Simon and Joseph, to be disposed of by them on a secret trust that he had revealed to Simon. Simon, who knew the trusts, after the death of the testator revealed them to Joseph, the trusts being that, if the testator's daughter died

(1) L. R. 4 H. L. 82, 89. (2) 15 Ch. D. 594, 607–8.
(3) 2 Vern. 50, 106.

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in the lifetime of her husband, the 1500*l.* should go to the children of another daughter, as the first daughter should direct. The first daughter did die in her husband's lifetime and the children of the second daughter claimed as beneficiaries under the verbal trust. This is a perfectly clear case of a trust being revealed upon the face of the will, the terms of which were communicated to one of the executors. It was held that the trust was well and sufficiently declared, although the actual method of distribution among the beneficiaries was uncertain. The Lords Commissioners approved this decision, as is found in the report, p. 106.

In *Pring* v. *Pring* (1) in the following year a man gave properties to his executors, directed that they should be held in trust and the testator's wife brought a bill declaring that the trust was in her favour. It was decided that, as the will had declared that the executors are only in trust and not declaring for whom, the person may be averred, and the wife's claim was accordingly admitted.

These cases were followed in *Smart* v. *Attersoll* (2), where again the gift was to executors in trust for purposes explained outside the will, and to the same effect was *Podmore* v. *Gunning* (3), though in that case the outside trust was not proved. These cases are before the Wills Act, but the principle applicable is the same, as wills were, by the Statute of Frauds, obliged to be in writing though if of personalty an attested signature was not required. After the Wills Act the cases proceed in the same channel.

In the case of *Johnson* v. *Ball* (4), a testator determined to settle upon his mistress and illegitimate children a policy of insurance for 2000*l.*, and by his will of February 21, 1844, he gave to two named trustees a policy to hold the same upon the uses appointed by letter "signed by them and myself" and he signed a declaration of the trusts by a subsequent document dated August 4, 1845. The Vice-Chancellor held that the trusts could not be carried out but the reasons for his judgment are most instructive. The learned judge points out that the letter referred to in the

(1) 2 Vern. 99.
(2) 1 Russ. 266.
(3) 7 Sim. 644.
(4) 5 De G. & Sm. 85, 91.

will had no existence at the time when the will was made and that, supposing it referred to a letter afterwards signed, it is impossible to give effect to it as a declaration of the trusts since it would admit the document as part of the will and it was unattested. The learned Vice-Chancellor adds: "Cases in which there is no trust appearing on the will, and where the Court establishes a trust on the confession of the legatee, have no application to the present; nor, as it appears to me, have those cases cited in the argument in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will." It is clear, therefore, that this authority does not affect the present case and it points to a case where the actual trusts were left over after the date of the will to be subsequently determined by the testator. It does not even cover the case where the trusts being already determined, they were subsequently communicated.

I omit the detailed examination of other cases, for they are all carefully considered and dealt with by Hall V.-C. in the case of *In re Fleetwood* (1), an authority which indisputably covers the present case if it be accurately decided. In that case the testatrix left to a named person all her personalty, "to be applied as I have requested him to do." The request was made out and the named trustee jotted down in the presence of the testatrix the names of the persons and the amounts which the testatrix desired to give and, after this, the codicil was executed. The point raised was the same as in the present case—namely, that when the trusteeship appears upon the instrument the trust must be for the next of kin or residuary legatees and that the Wills Act prevented effect being given to a trust to be effected by parol evidence. The learned Vice-Chancellor went through all the cases, including the case of *McCormick* v. *Grogan* (2), and decided that the trusts should be executed. That decision has never been definitely disapproved in any decided case, for the statements in *Le Page* v. *Gardom* (3) and *In re*

(1) 15 Ch. D. 594. (2) L. R. 4 H. L. 82.
(3) 84 L. J. (Ch.) 749, 752, 753.

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Gardner (1) are mere dicta in cases where the point raised here was not material, and, in my opinion, it was in fact followed in *In re Huxtable.* (2) In that case a testatrix bequeathed a sum of 4000*l.* for the charitable purposes agreed upon between us. The testatrix had, in fact, verbally communicated to the legatee her intention to leave him the sum of 4000*l.*, the income of which he was to apply during his life for the relief of sick and necessitous persons being members of the Church of England and that he was to dispose of the principal as his own property. Farwell J. admitted the evidence, including that which conferred upon the trustee power of disposing of the principal after his death. The Court of Appeal held that the evidence was admissible as to the trusts of the 4000*l.* which, upon the face of the will, was wholly given for charitable purposes but was not admissible for the purpose of providing for the 4000*l.* after the death of the trustee, since the will had given the whole 4000*l.* and such evidence would contradict the will. All the learned Lords Justices agreed that the affidavit of the trustee was admissible for the purpose of showing what were the charitable purposes but for no further purpose. There is nothing in the judgments that shows that this decision was affected by the fact that the gift was a charitable gift, nor on principle can I see that such distinction could be maintained, for, if a general charitable purpose only were disclosed by the will, a scheme might be prepared for carrying it into effect, and unless evidence were admitted the testatrix's specific instructions could have been disregarded; but they were not, they were distinctly carried out.

I agree with the Court of Appeal in thinking that this also is an authority in support of the doctrine laid down in *In re Fleetwood.* (3) In these circumstances, even if the antecedent decisions had been less definite, it would require a very clear conviction that *In re Fleetwood* (3) was wrongly decided to render it right and proper that it should now be overruled. The case of *Bourne* v. *Keane* (4) was referred to for the purpose of

(1) [1920] 2 Ch. 523, 532.
(2) [1902] 2 Ch. 793.
(3) 15 Ch. D. 594.
(4) [1919] A. C. 815.

showing that this House had overruled an authority of *West* v. *Shuttleworth* (1), which declared a gift of money for the purpose of saying masses to be illegal notwithstanding the fact that it had remained for seventy years. The circumstances were however entirely different from those in the present case, for the effect of *West* v. *Shuttleworth* (1) was to place a fetter upon the disposition of estate, and there is a great difference between removing a restriction which ought never to have been imposed and curtailing a liberty which has been long enjoyed. It is impossible to know the extent to which during the period of nearly fifty years the decision in *In re Fleetwood* (2) has been used by people similarly circumstanced to the testator in this case and, in these circumstances, it would not be right in the absence of very special reasons after this lapse of time to declare that such dispositions were bad.

In my opinion, however, *In re Fleetwood* (2) was not wrongly decided. It was decided in accordance with the series of authorities by which the law was established and which it is now too late to question or to overrule.

VISCOUNT SUMNER. My Lords, I am satisfied that *In re Fleetwood* (2), which is not distinguishable from the present case on the facts, was affirmed by the Court of Appeal in *In re Huxtable* (3), and that professional opinion generally has accepted these decisions as correct. In argument, however, counsel for the appellants treated it as almost self-evident that they conflicted with s. 9 of the Wills Act, and counsel for the respondents, while making no admission, elected to rely mainly on the time that has passed and the probable volume of rights that have arisen, since these cases were decided and in consequence of them. I do not think that this question ought to turn merely on the dates of the decisions and the extent of their adoption in practice. It is a grave thing to affirm a doctrine that violates the prescriptions of a statute and especially such a statute as the Wills Act,

(1) (1835) 2 My. & K. 684. (2) 15 Ch. D. 594.
(3) [1902] 2 Ch. 793.

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even though the error is of long standing. In view of this, and also in deference to the reservations of opinion expressed by Lords Dunedin and Parker of Waddington in *Le Page* v. *Gardom* (1) and Warrington L.J. in *Gardner's Case* (2), I venture to examine this aspect of the matter.

In itself the doctrine of equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition. A Court of conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction. The facts commonly but not necessarily involve some immoral and selfish conduct on the part of the legal owner. The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out. The special circumstance, that the gift is by bequest only makes this rule a special case of the exercise of a general jurisdiction, but in its application to a bequest the doctrine must in principle rest on the assumption that the will has first operated according to its terms. It is because there is no one to whom the law can give relief in the premises, that relief, if any, must be sought in equity. So far, and in the bare case of a legacy absolute on the face of it, I do not see how the statute-law relating to the form of a valid will is concerned at all, and the expressions, in which the

(1) 84 L. J. (Ch.) 749, 752, 753. (2) [1920] 2 Ch. 523, 532.

doctrine has been habitually described, seem to bear this out. For the prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual.

To this two circumstances must be added to bring the present case to the test of the general doctrine, first, that the will states on its face that the legacy is given on trust but does not state what the trusts are, and further contains a residuary bequest, and, second, that the legatees are acting with perfect honesty, seek no advantage to themselves, and only desire, if the Court will permit them, to do what in other circumstances the Court would have fastened it on their conscience to perform.

Since the current of decisions down to *In re Fleetwood* (1) and *In re Huxtable* (2) has established that the principles of equity apply equally when these circumstances are present as in cases where they are not, the material question is whether and how the Wills Act affects this case. It seems to me that, apart from legislation, the application of the principle of equity, which was made in *Fleetwood's* and *Huxtable's* cases, was logical, and was justified by the same considerations as in the cases of fraud and absolute gifts. Why should equity forbid an honest trustee to give effect to his promise, made to a deceased testator, and compel him to pay another legatee, about whom it is quite certain that the testator did not mean to make him the object of this bounty? In both cases the testator's wishes are incompletely expressed in his will. Why should equity, over a mere matter of words, give effect to them in one case and frustrate them in the other? No doubt the words "in trust" prevent the legatee from taking beneficially, whether they have simply been declared in conversation or written in the will, but the fraud, when the

(1) 15 Ch. D. 594. (2) [1902] 2 Ch. 793.

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trustee, so called in the will, is also the residuary legatee, is the same as when he is only declared a trustee by word of mouth accepted by him. I recoil from interfering with decisions of long standing, which reject this anomaly, unless constrained by statute.

The answer is put in the phrase, "this is making the testator's will for him," instead, that is, of limiting him to the will made in statutory form. What then of the legislation? Great authorities seem to have expressed an opinion, that this equitable principle, as a whole, conflicts with s. 9 of the Wills Act. Lord Cairns in 1868 says that when a devisee seeks to apply what has been devised to him otherwise than in accordance with the testator's intentions, communicated by him and accepted, "it is in effect a case of trust, and in such case the Court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills. . . . . But in this the Court does not violate the spirit of the statutes; but for the . . . . prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it": *Jones* v. *Badley*. (1)

In the following year in *McCormick* v. *Grogan* (2) Lord Hatherley says that this doctrine, that equity interferes to prevent a breach of an undertaking given to a testator, "is in itself a doctrine which involves a wide departure from policy which induced the Legislature to pass the Statute of Frauds," but is established "with reference to the jurisdiction of Courts of Equity to interpose in all cases of fraud," and Lord Westbury says: "It is a jurisdiction by which a Court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. . . . . The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside

(1) L. R. 3 Ch. 362, 364. (2) L. R. 4 H. L. 82, 88, 89, 97.

the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills."

My Lords, I venture to think that when, on the strength of these or similar general statements of the doctrine, it has been said that in this connection equity has "given the go-by" to the Wills Act (*In re Pitt-Rivers* (1)), less than justice has been done to equity and these great masters of it. When Lord Cairns speaks of equity not letting the devisee set up the statute it would seem that a fortiori equity would not set up the statute for itself to prevent the devisee from doing what it would have itself compelled him to do, if he had been negligent or dishonest in his trust, and when he speaks, in a figure, of "engrafting" the trusts on the devise surely he is saying in condensed words, that evidence, which could not be admitted to fill in what the testator's will leaves out, may yet be admissible to inform the Court what duty, onerous or not, it must bind on the conscience of the devisee, taking him as being with regard to legal title such a devisee as the will has made him according to its terms. This exactly conforms to Lord Westbury's phrases "converts" into a trustee one, who was not such under the will, and "imposes a personal obligation" on an individual, who under the Wills Act would get a title, not in itself so fettered.

In the authorities it has been common to classify these cases according as the terms of the will make the gift in question absolute or fiduciary. If it is by force of the words of the will that the residuary legatee takes what is given in trust without any specification of the trust, then parol evidence to show what that trust is would contradict the written will. Accordingly the crucial point is whether or not it is the will itself that gives this fund to the residuary legatee in such a case. Now s. 9 of the Wills Act prescribes the form, in which any disposition in a will must be testified, if it is to be valid,

(1) [1902] 1 Ch. 403, 407.

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but it does not deal with the construction of wills, or the application of the general law of trusts to interests created by wills. It is one thing to say that in itself the trust cannot be given effect to, not being expressed in the will, but it is quite another to say that, when for this reason the trust fails, the will gives the fund to the legatee in trust for the residuary legatee, as if the document, signed and witnessed, had said so in words. The question appears to be whether the resulting trust in favour of the named residuary legatee in such a case arises as part of the will or only as the result of the application of equitable doctrines to a portion of the testator's estate, which in the circumstances of the will has not been consistently disposed of ?

The Wills Act is an amending Act, of which it may be said in no merely theoretical sense that the Legislature was acquainted with the existing state of the law, as enacted and decided, to which it proceeded to apply amendments, for two Royal Commissions—the Real Property Commission of 1828 and the Ecclesiastical Commission of 1830—after inquiring (inter alia) into the subject of wills of real and personal property had reported before the Wills Act came before Parliament as a Bill. The extent to which parol evidence was admissible under existing practice for various purposes and the evils thereout arising were known. The equitable doctrine which is now before your Lordships was on record ever since *Pring* v. *Pring*. (1) In *Smith* v. *Attersoll* (2) it had been contended, as the appellants contend now, that the admission of evidence dehors the will was forbidden by statute, and its admission against the trustees to show the terms of their trust was supported by the Master of the Rolls on the doctrine of *Jones* v. *Nabbs* (3), that the Statute of Frauds was an Act to prevent frauds and perjuries, and that, where no question of fraud or perjury arose since the trustees admitted their trust, evidence could be referred to. The Wills Act made no attempt to correct this quaint way of regarding a statute. So far as s. 9 is concerned it simply

(1) 2 Vern. 99. (2) 1 Russ. 266.
(3) (1718) Gilbert Eq. Rep. 146.

increased and defined the formalities already required by law. Similarly there had long been litigation between executors and next of kin on the question how far a specific bequest to an executor adeemed his general right to take surplus personalty undisposed of, and on this intricate conflicts of evidence frequently took place and a separate statute, 11 Geo. 4 and 1 Will. 4, c. 40, had been passed to cover it by expressly providing how such surplus should go. No similar remedy is attempted by the Statute of Wills for the mischiefs that might arise from admitting evidence in a case like the present. Accordingly I think the conclusion is confirmed, which the frame of s. 9 of the Wills Act seems to me to carry on its face, that the legislation did not purport to interfere with the exercise of a general equitable jurisdiction, even in connection with secret dispositions of a testator, except in so far as reinforcement of the formalities required for a valid will might indirectly limit it. The effect, therefore, of a bequest being made in terms on trust, without any statement in the will to show what the trust is, remains to be decided by the law as laid down by the Courts before and since the Act and does not depend on the Act itself.

The limits, beyond which the rules as to unspecified trusts must not be carried, have often been discussed. A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime : *Johnson* v. *Ball* (1); *In re Boyes* (2); *Riordan* v. *Banon* (3); *In re Hetley*. (4) To hold otherwise would indeed be to enable the testator to "give the go-by" to the requirements of the Wills Act, because he did not choose to comply with them. It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts, as

(1) 5 De G. & Sm. 85.
(2) (1884) 26 Ch. D. 531.
(3) I. R. 10 Eq. 469.
(4) [1902] 2 Ch. 866.

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applied in this instance to trustees, who happen also to be legatees. If I am right in thinking that there is no contradiction of the Wills Act in applying the same rule, whether the trustee is or is not so described in the will, and the whole topic is detached from the enforcement of the Wills Act itself, then, whether the decisions in equity are or are not open to doubt in themselves, I think that, in view of the subject-matter of these decisions and the length of time during which they have been acquiesced in, your Lordships may well in accordance with precedent refuse to overrule them lest titles should be rendered insecure and settlements, entered into in reliance on their authority, should now be disturbed. It is to be remembered that the rule as to trusts not expressed in a will is not limited to relations such as the testator in this case was concerned to provide for, but may have been applied in many other connections. I pretend to no means of knowledge of my own, but it seems to me probable that effect has been given to these cases to a substantial extent and therefore that, to avoid possible injustice, your Lordships should refuse to interfere with them now. Accordingly in my opinion the appeal fails on all grounds.

LORD WARRINGTON OF CLYFFE. My Lords, the testator John Duncan Louis Blackwell on February 13, 1925, made a fourth codicil to his will in the following terms so far as it is material to the question raised by this appeal: "I give and bequeath to my friends Mark Oliver, Arthur Ernest Harrison, Fred Wettern, Edward Watson Barnett, William Percy Cowley the sum of 12,000*l.* free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purpose indicated by me to them with full power at any time to pay over the capital sum of 8000*l.* to such person or persons indicated by me as they think fit and to pay the balance of 4000*l.* to my trustees as part of my residuary estate and upon the same trusts as are declared in my will and previous codicils."

The testator died on June 3, 1925.

As to the facts it is only necessary to state that the evidence if admissible established *First* the names of the persons intended to be benefited and the purposes for which the capital and income of the fund were to be applied and *Secondly* that all the five trustees—four of them before and one after the execution of the codicil—accepted the trust and either expressly or by necessary implication promised the testator to carry it into effect.

It has long been settled that if a gift be made to a person or persons in terms absolutely but in fact upon a trust communicated to the legatee and accepted by him, the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a fraud on the part of the legatee. Of course in these cases the trust is proved by parol evidence, and such evidence is clearly admissible.

It is also settled that in such cases it is immaterial whether the trust is communicated and accepted before or after the execution of the will, inasmuch as in the latter case the testator, if it had not been accepted, might have revoked the will.

Further in *Moss* v. *Cooper* (1) Wood V.-C. said: "If, on the faith of a promise by A., a gift is made in favour of A. and B., the promise is fastened on to the gift to both, for B. cannot profit by A.'s fraud."

I think the principle on which this doctrine is founded is that the parol evidence is not adduced for the purpose of altering or affecting the will itself, the legatee still takes under the will, but is under a personal obligation the breach of which would be a fraud on the testator: *Cullen* v. *Attorney-General for Ireland*. (2)

The question is whether the same principle applies where, as in the present case, the fact that the gift is upon trust is mentioned in the will, though the terms of the trust can only be established by parol.

(1) (1861) 1 Jo. & H. 352, 367. (2) (1866) L. R. 1 H. L. 190.

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Eve J. and the Court of Appeal (the Master of the Rolls and Lawrence and Russell L.JJ.) have answered the question in the affirmative, basing their decisions on the judgment of Hall V.-C. in *In re Fleetwood* (1), the Court of Appeal also expressing the view that that judgment was followed by the Court of Appeal in *In re Huxtable.* (2)

I confess to having felt considerable doubt during the argument whether to apply the principle in such a case as the present would not be to give validity to a parol will in spite of the provisions first of the Statute of Frauds and secondly of the Wills Act. Subsequent reflection however and a careful perusal of the judgment of Hall V.-C. in *In re Fleetwood* (1), wherein the earlier authorities under both statutes are cited and discussed, have satisfied me that that case and, in consequence, the present case in the Courts below were rightly decided. I think the solution is to be found by bearing in mind that what is enforced is not a trust imposed by the will, but one arising from the acceptance by the legatee of a trust, communicated to him by the testator, on the faith of which acceptance the will was made or left unrevoked, as the case might be. If the evidence had merely established who were the persons and what were the purposes indicated it would in my opinion have been inadmissible, as to admit it would be to allow the making of a will by parol. It is the fact of the acceptance of the personal obligation which is the essential feature, and the rest of the evidence is merely for the purpose of ascertaining the nature of that obligation.

It was contended for the appellants, who claim as residuary legatees to be entitled to the fund should the trust not be established, that the fraud for the avoidance of which the trust is enforced must be the personal fraud of the legatee, but I think the answer is that, if it would be a fraud on the part of the legatees to refuse to carry out the trust, the residuary legatees cannot take advantage of and thus make themselves parties to such fraud. On this point I agree with the view expressed by Wood V.-C. in *Moss* v. *Cooper* (3) and by Hall V.-C. in *In re Fleetwood.* (1)

(1) 15 Ch. D. 594. (2) [1902] 2 Ch. 793.
(3) (1861) 1 Jo. & H. 352, 367.

The authorities prior to *In re Fleetwood* (1), some of them dating as far back as 1688 and 1689, were carefully analyzed by Hall V.-C. in his judgment and I see no necessity for referring to them again. They were conflicting, and it was quite open to the learned judge to follow those which supported his own view. I think also that *In re Huxtable* (2) could not have been decided as it was unless the Court had approved of the decision in *In re Fleetwood*. (1)

For these reasons I think that this appeal should be dismissed with costs.

LORD BUCKMASTER. My Lords, my noble and learned friend Lord Carson desires me to say that he agrees with the views that have already been expressed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Jan. 24, 1929.

Solicitors for the appellants : *Rooke & Sons, for T. & G. S. Brownson, Hyde and Manchester.*

Solicitors for the respondents : *Simmons & Simmons, for Graham-Hooper & Betteridge, Brighton, and March, Pearson & Green, Manchester.*

(1) 15 Ch. D. 594. (2) [1902] 2 Ch. 793.

[HOUSE OF LORDS.]

H. L. (E.)* 1929 Jan. 31.

GRAIGOLA MERTHYR COMPANY, LIMITED . . . . . } Appellants;

AND

CORPORATION OF SWANSEA . . . Respondents.

Public Authorities Protection—Costs—Taxation as between Solicitor and Client—Quia timet Action — Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The Public Authorities Protection Act, 1893, s. 1, provides that where any action is brought against any person "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority," and in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:—

Held, that the section applies to a quia timet action.

Harrop v. *Ossett Corporation* [1898] 1 Ch. 525; *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (1899) 63 J. P. 503; and *Fielden* v. *Morley Corporation* [1899] 1 Ch. 1; [1900] A. C. 133 followed.

Decision of the Court of Appeal [1928] Ch. 235 affirmed.

Appeal from an order of the Court of Appeal (1) affirming a judgment of Tomlin J. (2)

The appellants were the owners of a mine which extended underneath the site of a reservoir, known as the Blaennantddu Reservoir, constructed by the respondents under the Swansea Waterworks Acts, 1860 and 1873.

On January 12, 1920, the respondents wrote to the appellants that they intended to fill the reservoir with water, and they persisted in that intention, notwithstanding the remonstrances of the appellants, but they made no attempt to fill the reservoir.

On October 26, 1920, the appellants brought an action against the respondents for an injunction to restrain them from filling the reservoir with water, on the ground that

* *Present:* Lord Hailsham L.C., Viscount Dunedin, Lord Shaw of Dunfermline, Lord Buckmaster, and Lord Carson.

(1) [1928] Ch. 235. (2) [1928] Ch. 31.

the reservoir, if filled, would cause an inundation of the appellants' mine. The facts are fully stated in the report of the case before Tomlin J.

Tomlin J. dismissed the action on the ground that the Court was not satisfied that the filling of the reservoir would cause an inundation of the appellants' mine, and directed that the appellants should pay to the respondents two-thirds of their costs of action.

The minutes of the judgment as prepared by the registrar directed that the costs of the action should be taxed as between solicitor and client in accordance with the Public Authorities Protection Act, 1893. A motion to vary the minutes by omitting therefrom the words "as between solicitor and client" was refused by Tomlin J., who held that the Act applied, and directed that his original judgment should be drawn up, including the words "as between solicitor and client," and should be postdated.

The appellants appealed against so much of the judgment as directed that the costs should be taxed as between solicitor and client, and the Court of Appeal (Lord Hanworth M.R., and Sargant and Lawrence L.JJ.) affirmed the judgment of the learned judge.

1928. Nov. 27, 29. *Upjohn K.C.* (with him *A. T. James K.C.*) for the appellants. Sect. 1 of the Public Authorities Protection Act, 1893, which provides by cl. (*b*) that where any action is brought against any person for any act done in pursuance or execution of any Act of Parliament or of any public duty or authority, and in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client, does not apply to a quia timet action. That section relates only to an action for an act actually done. Clause (*a*) of the section, which prescribes a special period of limitation for such an action, cannot be applied to a case where no act has been done and the object of the action is to prevent any act from being done. There must be an act done in order to start the statutory period of six months. If the letter of the

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respondent authority of January 12, 1920, stating their intention to fill the reservoir was the cause of action in this case, then the action was out of time; but this point was never suggested. The letter was merely evidence of the threat. There is in this Act no language directed to acts not yet done but only threatened. The words of the Act need careful and strict scrutiny so as not to cut down the ordinary rights of the subject further than is absolutely necessary: *Bradford Corporation* v. *Myers* (1), per Lord Buckmaster and Lord Haldane. In *Fielden* (or *Fielding*) v. *Morley Corporation* (2) Lindley M.R. said that the Act was not confined to common law actions for damages, but applied also to actions for an injunction, but in that case there was an act done, and the Master of the Rolls was not considering the question of quia timet actions.

[*Grant K.C.* for the respondents. That decision was given after consulting the members of the other branch of the Court of Appeal, as appears from the report of the case in the Times Law Reports (3), and the argument, as there reported, clearly raised the point.]

In *Harrop* v. *Ossett Corporation* (4) the action was stated in the report to be a quia timet action, but no argument was directed to that point. The question was whether the Act contemplated both actions for damages and actions for an injunction, and Romer J. held that it did. In *Holford* v. *Acton Urban District Council* (5) the successful defendants were allowed costs as between solicitor and client according to the Act, but the point was not argued. In *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (6) Stirling J., no doubt, held that the Act applied to a quia timet action. It is submitted that that decision was erroneous. That is the only case in which the point has been definitely considered.

[He also referred to *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works.* (7)]

(1) [1916] 1 A. C. 242, 246, 250.
(2) [1899] 1 Ch. 1.
(3) (1898) 14 Times L. R. 566, 567.
(4) [1898] 1 Ch. 525.
(5) [1898] 2 Ch. 240.
(6) 63 J. P. 503.
(7) [1898] 2 Ch. 603.

Grant K.C. and *Valentine Holmes* for the respondents were not called upon.

The House took time for consideration.

1929. Jan. 31. LORD BUCKMASTER. My Lords, the Lord Chancellor desires me to say that he has read this opinion, which I have committed to writing, and that with it he agrees. The facts necessary to disclose the question upon which this appeal depends need not be dealt with historically, but can be summarized in a few sentences. The appellants are the owners of a colliery, and at the material dates were working a seam of coal called the Graigola Seam, which extends under the site of a reservoir constructed by the respondents, who are the urban sanitary authority for the district and borough of Swansea. By arrangement between the parties, the reservoir had been emptied, but on January 12, 1920, the town clerk of the respondents sent a letter to the appellants stating that it would be refilled. No act, in fact, was done towards the filling, but the appellants, apprehending that it could only take place at the imminent risk of damage to their colliery workings and of possible loss of life, instituted the proceedings out of which this appeal arose, asking for an injunction to restrain the respondents from filling the reservoir. This proceeding was in its essence a Chancery suit for a quia timet injunction. After a prolonged hearing the action failed and was dismissed with costs, but the appellants' liability was limited to two-thirds of the total amount. No express reference was made in the actual judgment to the costs being as between solicitor and client. The minutes of the order prepared by the registrar introduced this provision upon the ground that s. 1 of the Public Authorities Protection Act, 1893, applied. The costs are said to have been brought in at the sum of 70,000*l.*, and the appellants, not unnaturally being anxious to limit as far as possible their liability, moved to vary the minutes by omitting the words "as between solicitor and client." This motion was refused by Tomlin J., and his judgment was affirmed by the Court of Appeal.

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Sect. 1 of the Public Authorities Act of 1893 is as follows: "1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

The appellants urge that these terms can have no application to such proceedings as those they instituted, that the relief they sought was a relief against the immediate intention to do something, and that it was not an action to restrain the repetition or continuance of a definite wrongful act. Consequently, they contend that it would be impossible to assign the "act done" referred to in s. 1, and that it is only in respect of an action for an act done that the protection in sub-s. (*b*) applies. They enforce this argument by saying that the period of limitation for the action is six months after the act done, and that it is impossible to convert an intention to do something into something actually done. They further point out that this House in the case of *Bradford Corporation* v. *Myers* (1) has declared that the Act applies only to a definite class of action, and that the words need careful and strict scrutiny. There is no need to enlarge upon the principle there laid down. An Act conferring privileges such as these upon a special class of person certainly needs strict examination, and the question as to whether, so regarded, the Statute applies to a suit like the present is

(1) [1916] 1 A. C. 242.

one that would need most careful consideration were the matter free and open for discussion.

But, in fact, I cannot think that is the real position. It is perfectly true that there is no statement made in this House to bind our judgment, but there are to be found precedents of very great authority, long standing and uniform, and in such a case as this, which really relates to a form of statutory practice, I cannot think that it would be right that those authorities should be set aside.

The earliest to which our attention has been called is *Harrop* v. *Mayor of Ossett*. (1) In that case the proceedings were to restrain the use of a building for smallpox patients, and an injunction only was claimed. The argument against allowing costs as between solicitor and client depended, according to the report, on an argument that the section does not refer to an action for an injunction at all; it does not appear in the report that a definite distinction was drawn between an injunction to restrain the continuance or repetition of a definite wrongful act and an action to restrain an act not done but only threatened. It is, however, impossible to overlook the fact that this action was on its face a quia timet action, and that the difference between the two forms of injunction was thoroughly well known to Romer L.J., who was the judge then sitting in the Court of first instance, by whom the matter was determined. He said: "The word 'action' as used in this Statute includes all actions in the Chancery Division, whether actions for an injunction, or actions partly for an injunction and partly for damages." That sentence, to my mind, shows that the distinction was drawn, which counsel for the appellants say was overlooked. An action for an injunction to restrain the repetition of a wrongful act actually committed almost of necessity involves a claim for damages for what has already been done as well as an injunction to restrain its continuance. An action for an injunction alone and an action partly for an injunction and partly for damages is by no means an inapt description of the two different grounds for relief. It

(1) [1898] 1 Ch. 525, 527.

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is, to my mind, clear that that decision is a plain and direct authority against the appellants' contention.

A similar decision is that of *Toms* v. *Clacton Urban District Council* (1), decided a few months later by the same learned judge in the same way. He said in his judgment: "This action appears to me to be one against the defendants for using or being about to use certain land for burial purposes, and is, in my opinion, within the words of the Act, an action against the defendants for 'an act done in pursuance . . . . of . . . . public duty,' and I cannot see, therefore, why the Act does not apply."

In *North Metropolitan Tramways Co.* v. *London County Council* (2) the question was merely whether an order dismissing such an action against a local authority with costs carried as of right under the Statute the taxation of such costs as between solicitor and client, where the actual judgment was silent in the matter. It was held that it did.

In *Holford* v. *Acton Urban District Council* (3) the action was brought to restrain the use of certain plots of land for purposes said to be prevented by restrictive covenants. The action failed on the ground that the negative stipulation did not apply, and the action was dismissed with costs, which it was held included costs as between solicitor and client. The present point does not appear to have been raised.

In *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (4), however, the substance of which is reported in [1898] 2 Ch., this special point was once more urged, as shown in the report in the Justice of the Peace. The claim there was a claim for a declaration, which was refused, and a special application was made seeking to have the costs taxed as between solicitor and client which had been refused by the Taxing Master. That the very point was argued appears from the judgment of Stirling J., as is shown by this extract from his judgment: "It is said that because the action claims simply a declaration, it is not an action brought for some act of the defendants. So to decide would

(1) (1898) 78 L. T. 712.
(2) [1898] 2 Ch. 145.
(3) [1898] 2 Ch. 240.
(4) [1898] 2 Ch. 331; 63 J. P. 503.

be shutting one's eyes to the facts of the case. The action was not brought to decide an abstract question but to ascertain whether the defendants would be right or wrong if they carried out their threats and took proceedings, as they had threatened to do. In my opinion, the case falls within the provisions of the section and the defendants are entitled to their costs as between solicitor and client."

In the case of *Fielden* (or *Fielding*) v. *Morley Corporation* (1) the matter came for the first time before the Court of Appeal, and was the subject of a considered judgment. The Court consisted of Lindley M.R., Chitty and Collins L.JJ. The point arose in an action by a landowner to restrain the Mayor and Corporation of Morley from allowing the water passing along an aqueduct or conduit to their reservoir to overflow on his land. The action failed, and the question arose as to whether the defendants were entitled to solicitor and client costs. The case of *Harrop* v. *Ossett Corporation* (2) was cited, and it was sought by the plaintiff to distinguish the case, while the defendants relied upon the statement by Romer J., which they said was an exact expression of the law. Lindley M.R. said : " It appears to me, and to all of us, that the section I have just read " (i.e., s. 1 of the Public Authorities Act of 1893) " applies to all actions, including what used to be called ' suits in Chancery ' ; it applies to injunction actions as well as to actions for damages ; and the dismissal of an action, which is the common form in the Chancery Division, is equivalent to judgment for the defendants. So far there is no doubt at all in our opinion." He then continues to point out that the section does not apply to appeals nor to interlocutory applications, but is intended to protect bodies from expense when they are unsuccessfully sued " in respect of acts done, or omitted to be done, in the exercise of statutory powers or duties." It is quite true that these last words do not include acts threatened to be done, and the action itself was not of a purely quia timet character, but the judgment followed the case of *Harrop* v. *Ossett Corporation* (2), and, if it were intended to draw the distinction now sought to be

(1) [1899] 1 Ch. 1, 4. (2) [1898] 1 Ch. 525.

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established, which had been definitely rejected by Romer J., it is, to my mind, impossible that the earlier words would have been used saying that the statute applied to all actions and applied to injunction actions as well as to actions for damages. It was said at the Bar that this judgment was approved by members of the other Court of Appeal. Whether it be so or not, the ordinary action for an injunction in respect of apprehended damage could not have been absent from the minds of the learned judges, and is included in their general words. It should be remembered that at this time quia timet actions to prevent building so as to interfere with light were the commonest form of applications for injunctions in the Chancery Division, for, as the law then stood, any building that interfered with any light enjoyed for the statutory term could be restrained, and the resulting actions were manifold. *Fielden* v. *Morley Corporation* (1) came before this House. The question as to costs was again raised. The Lord Chancellor said the Act might be a hard one, but was plain as to the costs of the action. For the reasons I have already pointed out such a statement cannot be regarded as a decision of this House upon the very point, but, at least, no attempt seems to have been made to qualify the general statement made as the considered judgment of the Court of Appeal or to base the decision upon the ground of the special form of injunction then sought for.

These decisions have, therefore, been current for a period of thirty years. Though they relate to a statutory privilege, it is a privilege attached to the practice relating to actions in the Court of first instance, and in this matter we have the direction of judges so eminently familiar with the question now raised as Lindley M.R., Romer, Chitty and Stirling L.JJ.

With regard to the point urged that, in such a case, it would be impossible to define the point from which the limited period of limitations for bringing an action provided by the section begins to run, and that the act done is for that purpose the same as the act that forms the basis of the action,

(1) [1900] A. C. 133.

their Lordships do not think that this provides an insuperable difficulty. It must be remembered that a mere vague apprehension is not sufficient to support an action for a quia timet injunction. There must be an immediate threat to do something: see *Lord Cowley* v. *Byas* (1); and it is not impossible, though it may be difficult, to fix a point of time when that threat was made. The argument of Mr. Upjohn that such threat, whether verbal or by conduct, is nothing but evidence and it is not in itself an actionable wrong is weighty, but at least it must be a threat which establishes the right to apply for protection, and the moment when that right arises may be capable of determination, although the provision as to the period of limitations can hardly arise in connection with such a suit as that for a quia timet injunction.

For these reasons I think this appeal must fail.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD BUCKMASTER. My Lords, my noble and learned friends, Lord Shaw and Lord Carson, desire me to say that they agree with the opinion I have just read.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Jan. 31, 1929.

Solicitors for the appellants: *Beamish, Hanson, Airy & Co., for Gwilym James, Llewellyn & Co., Merthyr Tydfil.*

Solicitors for the respondents: *Peter Thomas & Clark, for H. L. Lang-Coath, Swansea.*

(1) (1877) 5 Ch. D. 944, 950.

[HOUSE OF LORDS.]

H. L. (E.)* 1929 Feb. 14.

TILLING-STEVENS MOTORS, LIMITED Appellants;

AND

KENT COUNTY COUNCIL and Another Respondents.

Revenue—Licence Duties—Mechanically-propelled Vehicles—Electrically-propelled Vehicle—Petrol-electric Vehicle—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 13; *Sch. I., para.* 5.

A vehicle commonly known as a "petrol-electric" motor derived its primary motive power from an ordinary internal combustion engine; that engine was connected with an electric dynamo, and the electricity generated in the dynamo was transmitted to an electric motor, which drove the rear wheels of the car through a cardan shaft and differential gear:—

Held, that the vehicle was an "electrically-propelled" vehicle within the meaning of para. 5 of Sch. I. to the Finance Act, 1926, and was, under s. 13 of the Finance Act, 1920, as amended by s. 13 of the Act of 1926, chargeable with licence duty as such.

Decision of the Court of Appeal [1929] 1 Ch. 66 reversed.

Appeal from an order of the Court of Appeal reversing a judgment of Clauson J. (1)

The appellants, who carried on business as engineers and motor chassis manufacturers at Maidstone, made, amongst other vehicles, a certain "petrol-electric" vehicle in which a petrol engine and electric generator generated electricity, which was used in an electric motor to propel the rear wheels.

The respondent council was the licensing authority, having statutory powers to levy and collect duties on licences for mechanically-propelled vehicles, which powers were subject to regulations made by the respondent, the Minister of Transport, those duties, when so levied, being payable to that Minister.

Under the First Schedule to the Finance Act, 1926, the licence duties (imposed by s. 13 of the Finance Act, 1920, as amended by s. 13 of the Finance Act, 1926) in respect of electrically-propelled vehicles, constructed or adapted

* *Present:* Lord Hailsham L.C., Viscount Sumner, Lord Buckmaster, Lord Blanesburgh, and Lord Warrington of Clyffe.

(1) [1929] 1 Ch. 66.

for the purposes therein mentioned—and it was not disputed that the appellants' petrol-electric motor was so constructed or adapted—were at a lower rate than the rate of duty for a vehicle which was not electrically-propelled. The principle of the working of the appellants' vehicle was described in the appellants' own prospectus as follows: "The primary motive power is a four-cylinder internal combustion engine of the usual type. This is coupled through a spring drive to an electric generator which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear."

The appellants charged the Council with having wrongfully refused to license one of their petrol-electric vehicles as an electrically-propelled vehicle at the rate of duty chargeable thereon under the Schedule to the Act, and sought a declaration that the vehicle in question and vehicles similar thereto were "electrically-propelled" vehicles within the meaning of para. 5 of the Schedule, and chargeable with the licence duty prescribed in respect of such type of vehicle.

Clauson J. held that the appellants' vehicles were electrically-propelled vehicles within the meaning of para. 5 of the Schedule and granted the declaration claimed by the appellants. The Court of Appeal, by a majority (Lord Hanworth M.R. and Lawrence L.J.; Russell L.J. dissenting), reversed the judgment of the learned judge and dismissed the action.

The arguments are reported in the report of the case before Clauson J. and the Court of Appeal and need not be repeated.

Sir Arthur Colefax K.C. and *Trevor Watson* for the appellants.

Sir Thomas Inskip A.-G., *Stafford Crossman* and *K. E. Shelley* for the respondents.

LORD HAILSHAM L.C. My Lords, this is an appeal from a decision of the Court of Appeal which, by a majority, allowed an appeal from the decision of Clauson J. in the Chancery Division.

The appeal raises a very narrow point of construction upon the meaning of the language used in a clause of the

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First Schedule to the Finance Act, 1926. By that Act certain duties were imposed upon mechanically-propelled vehicles, and by para. 5 of the First Schedule rates were imposed upon vehicles of a certain description "being vehicles which are electrically-propelled." Later on in the same paragraph a different and higher rate of duty is imposed upon those vehicles which are "other than electrically-propelled vehicles." The question which your Lordships are called upon to determine is whether the type of vehicle which is in question in the present action is a vehicle which is electrically-propelled, or is a vehicle other than an electrically-propelled vehicle.

My Lords, it appears that the vehicle which is in question in this case is what is described as a petrol-electric vehicle. The primary motive power in such a machine is an ordinary internal combustion petrol engine; that engine is connected with an electric dynamo, and the electricity generated in the dynamo is transmitted to an electric motor; the electric motor drives the rear wheels of the car through a cardan shaft and differential gear. The respondents contend that this is not an electrically-propelled vehicle because they say that the effect of the statute is to treat the vehicle as a whole and to fix the rate of duty by determining what it is in the vehicle which generates the energy propelling the vehicle over the ground. The Attorney-General pointed out that the original source of the energy in the vehicle itself was the internal combustion engine; he said that the electricity was only a means of transmitting the power generated in the combustion engine to the rear axle and, therefore, in effect this was a vehicle which was propelled by a petrol combustion engine and not an electrically-propelled vehicle. My Lords, I cannot think that that argument is sound. It is perfectly true, as appears from the evidence, that one reason for departing from the ordinary petrol combustion engine was the desirability of eliminating gear changes, and of providing a smoother method of running and of starting the car; but although the reason for the production of a vehicle of this type was the desirability of overcoming difficulties in transmission, it is, I think, necessary to see what was the method

which was chosen for attaining that end. The method adopted here is to convert the energy generated in the combustion engine into electricity by means of the dynamo, and to use the electricity so generated for the purpose of propelling the vehicle, and in my judgment the vehicle does not cease to be an electrically-propelled vehicle by reason of the fact that the electricity is generated by a combustion engine which is contained in the vehicle itself or by reason of the fact that the purpose for which this device was adopted was that of overcoming the ordinary difficulties in the transmission of power. There was, in fact, not merely a change in the method of transmission; there was a generation of electricity in the vehicle itself, and a use of that electricity so generated for the purpose of propelling the vehicle. In my judgment that falls within the exact language of the Act of Parliament, and I do not think it is open to your Lordships, in the face of the plain language of the statute, to speculate as to the reasons which induced Parliament to use that language, it being admitted that there is nothing in the statute itself which throws any light upon the subject or which gives any reason for departing from its plain language.

My Lords, on those grounds the appeal in my view succeeds, and I move your Lordships accordingly.

VISCOUNT SUMNER. My Lords, I agree. I do not think that the words of the statute "being vehicles other than electrically-propelled vehicles" are shown to be adequate to include the petrol-electric vehicles in question, or to attract the higher rate of tax. I think the declaration made by Clauson J. that the proper rate of tax was under the other words "being vehicles which are electrically-propelled" was right.

LORD BUCKMASTER. My Lords, I agree.

LORD BLANESBURGH. My Lords, I agree.

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

Order of the Court of Appeal reversed, and judgment of Clauson J. restored. The respondents to

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pay the costs in the Court of Appeal, and also the costs of the Appeal to this House. Cause remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 14, 1929.

Solicitors for the appellants: *Godden, Holme & Ward.*
Solicitors for respondents: *G. B. Hemming & Son, for Bracher, Son & Miskin, Maidstone; The Treasury Solicitor.*

ictum of LORD HAILSHAM, L.C., at 365, *considered.* PEARSON *v.* AMBETH B.C. [1950] 1 All E.R. 682.

Distinguished. PEARSON *v.* COLEMAN BROS. [1948] 2 All E.R. 274.

plied. BUCKLAND & GUILDFORD, ETC. CO. [1949] 1 K. B. 410

istinguished. PEARSON *v.* COLEMAN BROS. [1948] 2 K. B. 359

[HOUSE OF LORDS.]

H. L. (Sc.)* 1929 *Feb.* 25.

ROBERT ADDIE AND SONS (COLLIERIES), LIMITED . . . . } APPELLANTS;

AND

DUMBRECK . . . . . RESPONDENT.

Negligence—Dangerous Machine—Injury to Child—Liability of Occupier—Trespasser or Licensee.

A boy four years of age was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. The system, which was used for depositing ashes on a bing situated in a field adjoining the colliery, consisted of an endless wire cable operated from time to time, as might be necessary, from the pithead by an electric motor, while at the other end of the system, which was not visible from the pithead, there was a heavy horizontal iron wheel round which the cable passed and returned. The field was surrounded by a hedge, which was quite inadequate to keep out the public, and it was, to the knowledge of the colliery company, used as a playground by young children. The colliery officials at times warned children out of the field, but their warnings were disregarded. The wheel was dangerous and attractive to children, and at the time of the accident it was insufficiently protected. The accident occurred owing to the wheel being set in motion by the colliery servants without taking any precaution to avoid accident to persons frequenting the field. The boy had been warned by his father not to go near the field or the wheel.

**Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD BUCKMASTER, and LORD CARSON.

In an action for damages by the father against the company :— *Held*, that the boy was a trespasser and went on the colliery premises at his own risk, and that the company owed him no duty to protect him from injury.

Cooke v. *Midland Great Western Ry. of Ireland* [1909] A. C. 229 and *Lowery* v. *Walker* [1911] A. C. 10 distinguished.

Hardy v. *Central London Ry. Co.* [1920] 3 K. B. 459 approved.

Decision of the First Division of the Court of Session in Scotland 1928 S. C. 547 reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland affirming by a majority (the Lord President and Lord Sands ; Lord Blackburn dissenting) an interlocutor of the Sheriff-Substitute of Lanarkshire finding the appellants liable in damages to the respondent to the amount of 100*l.* in respect of the death of the respondent's son, four and a half years of age, who was accidentally killed through being crushed in the terminal wheel of a haulage system belonging to and worked by the appellants.

The following statement is taken from the opinion of the Lord Chancellor :—

"The facts, as found by the Court of Session, were as follows : The accident happened in a field at a spot about 100 yards from a public road. The field formed part of View Park Colliery and was used as a dump for the deposit of ashes from the pithead. It was separated from the public road by a hedge in which there were at the time of the accident numerous large gaps, including a gap of 10 feet opposite the point at which the accident happened. There were two gates to the field, at one of which there was a notice board bearing the words 'Trespassers will be Prosecuted.' The haulage system consisted of an endless wire cable operated from time to time, as might be necessary, for the purpose of removing ashes from the pithead by an 8 horse-power electric motor situated at the pithead, while at the other end of the system (which was not visible from the pithead) there was a heavy horizontal iron wheel round which the cable passed and returned at a speed of from 2 to $2\frac{1}{2}$ miles per hour. The wheel at the front, where the cable entered

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and left, was in no way enclosed or protected, while on the top it was covered by four covering boards. In front of the wheel the cable had worn grooves or depressions in the adjacent surface of the ash-dump so that there was a space 8 inches or 9 inches deep in the centre from ashes to covering board and rather more at the sides.

The respondent had warned his son not to enter the colliery premises or to go near the wheel. The hedge was quite inadequate to keep the public and in particular, children, out of the ground which was, in fact, to the knowledge of the appellants, habitually traversed by members of the public as a short cut and frequented by youths and children of all ages. The appellants' employees at times warned children out of the field and reproved adults, but, as the appellants knew, the children disregarded warnings and the adults continued to frequent the field. The watch kept by the appellants' servants was casual and ineffective, except in so far as it was directed to guarding the wood piles and coal bings, and the ground in question was to the appellants' knowledge used as a playground by young children near the wheel and elsewhere. The wheel was dangerous and attractive to children and insufficiently protected at the time of the accident. The child who was killed was a little over four years of age and the accident occurred owing to the child, when sitting on the cover of the wheel or in a position in front of and in close proximity to the pulley and rope, being caught and drawn into the mechanism when it was set in motion by the appellants' servants.

Having regard to those facts, the Court of Session had held that the accident was due to the fault of the appellants in setting the haulage system in operation in the circumstances stated above without taking any precaution to avoid accident to persons frequenting the field in the near neighbourhood of the haulage system, and accordingly they awarded damages to the respondent."

1928. Nov. 13, 19. *Graham Robertson K.C.* (of the Scottish Bar) (with him *James R. Marshall* (of the Scottish

Bar) and *Harold Beveridge* (of the English Bar)) for the appellants. The liability of the appellants to the respondent for the death of his child depends primarily on the answer to be given to the question, was the child a trespasser on the appellants' property at the time of the accident or was he there by the licence or invitation, express or implied, of the appellants? In the case of a trespasser the only duty on the owner is not to injure him wilfully—not to do a wilful act in reckless disregard of humanity towards him: *Latham* v. *R. Johnson & Nephew, Ld.* (1) Upon the facts found by the Court of Session, which are binding on your Lordships, this child was a trespasser. On the principle above stated the appellants are under no liability, if, in trespassing, the child injured himself on objects legitimately on their land in the course of their business. A trespasser takes the risk of traps, unless they are designed to injure him. *Hardy* v. *Central London Ry. Co.* (2) completely covers this case. There were in that case the same repeated course of trespass and the same ineffectual warnings off as in this. In *Cummings* v. *Darngavil Coal Co.* (3), where the facts averred by the pursuer were substantially identical with the facts proved in this case, the action was dismissed for irrelevancy, and the case is important as showing that a proprietor is under no duty "to fence his property so as to prevent trespassers from running into danger through the working of machinery which he is quite legitimately using on his own property." In *Devlin* v. *Jeffray's Trustees* (4) it is laid down by Lord Kinnear, first, that the failure to prevent children using a piece of ground as a playground cannot be construed as an invitation to them to be there, and, secondly, that the doctrine that people who come on the lands of others for their own purposes without right or invitation must take the lands as they find them, and, if they are exposed to injury from unseen dangers, must take care of themselves is just as much a part of the law of Scotland as of the law of England. In *Haughton* v.

(1) [1913] 1 K. B. 398. 466, 469, 470, 473.
(2) [1920] 3 K. B. 459, 465, (3) (1903) 5 F. 513, 517.
(4) (1902) 5 F. 130.

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North British Ry. Co. (1), where a child trespasser on a railway siding was run over by a railway wagon, it was held by the majority of the Inner House that the pursuer's averments meant that the defenders' servants engaged in shunting operations knew that a child was on the line at the time, and that consequently the pursuer had stated a relevant case. That really depends on the principle that no man can be justified in wilfully inflicting an injury on another. If the defenders' knowledge had been merely that children might be trespassing on the line no duty would have rested upon them to take any precautions for the children's safety. *Lowery* v. *Walker* (2) is not opposed to the appellants' contention, because this House declined to regard that as a case of trespass, and in *Grand Trunk Ry. of Canada* v. *Barnett* (3) Lord Robson, delivering the judgment of the Privy Council, expressed the opinion that even if *Lowery* v. *Walker* (2) were treated as a case of trespass the conduct of the defendant showed a reckless disregard of humanity rather than a mere want of reasonable care. Even if the child ought to be regarded as a licensee, the only duty of the appellants was not to lay a trap for him or expose him to some unseen or unusual danger. But here the wheel and the rope were in situ before any houses were built in the neighbourhood and, their existence being well known to the parents and children of the neighbourhood, the appellants have not failed in any duty which lay upon them. The owner is under no liability as to existing traps, but must not create new traps without taking precautions to protect licensees against them : *Hayward* v. *Drury Lane Theatre and Moss' Empires* (4) ; *Coleshill* v. *Manchester Corporation.* (5)

[He also referred to *Reilly* v. *Greenfield Coal and Brick Co.* (6) and *Glasgow Corporation* v. *Taylor.* (7)]

Lastly, the respondent is precluded from recovering on the ground of contributory negligence in that he did not prevent the child from trespassing : *Hardie* v. *Sneddon.* (8)

(1) (1892) 20 R. 113.
(2) [1911] A. C. 10.
(3) [1911] A. C. 361, 370.
(4) [1917] 2 K. B. 899, 913.
(5) [1928] 1 K. B. 776, 791–793.
(6) 1909 S. C. 1328, 1336.
(7) [1922] 1 A. C. 44.
(8) 1917 S. C. 1, 4, 5.

George Morton K.C. and *Albert Russell* (both of the Scottish Bar) (with them *Weitzman* (of the English Bar)) for the respondent. The question of what duty attaches to the appellants is a question to be determined by the facts showing the relationship between the parties, and on the facts here found the relationship between the appellants and the respondent's child was such as to cast upon the appellants the duty of taking reasonable precautions to prevent accident befalling the child. The appellants were aware of and acquiesced in the habitual resort of children to the vicinity of the wheel, which the appellants must have known was not only attractive to children, but, owing to its intermittent working, was a danger which was not obvious to them. The findings are sufficient to justify the inference that the children were in the vicinity of the wheel with the implied leave or licence of the appellants, and they impose a duty on the appellants which they have failed to discharge: *Cooke* v. *Midland Great Western Ry. of Ireland* (1); *Lowery* v. *Walker* (2); *Reilly* v. *Greenfield Coal and Brick Co.* (3); *Mackenzie* v. *Fairfield Shipbuilding and Engineering Co.* (4); *M'Kinlay* v. *Darngavil Coal Co.* (5); *Boyd* v. *Glasgow Iron and Steel Co.* (6) As regards concealed dangers the landowner owes a special duty to children: *Cooke* v. *Midland Great Western Ry. of Ireland* (7); *Latham* v. *R. Johnson & Nephew, Ld.* (8); *Mersey Docks and Harbour Board* v. *Procter* (9); and this duty attaches, not only if the landowner knew that a child actually was on the premises, but if he knew that a child was likely to be there: per Lord Finlay in *Taylor* v. *Dumbarton Tramways Co.* (10) The question whether this principle extends to the case of a trespasser was kept open by Lord Atkinson in *Cooke's* case (7), but it is conceded that it has never been applied to that case. It is sufficient to fix the appellants

(1) [1909] A. C. 229, 238, 241.
(2) [1911] A. C. 10.
(3) 1909 S. C. 1328, 1336.
(4) 1913 S. C. 213.
(5) 1923 S. C. (H. L.) 34, 36.
(6) 1923 S. C. 758, 763.
(7) [1909] A. C. 229, 238, 239.
(8) [1913] 1 K. B. 398, 413–420.
(9) [1923] A. C. 253, 276.
(10) 1918 S. C. (H. L.) 96, 101.

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with liability that the respondent's child was a member of a class of persons whom the appellants knew to be in the habit of resorting to the field and the near neighbourhood of the haulage system.

[LORD HAILSHAM L.C. referred to *Coffee* v. *McEvoy*. (1)]

Graham Robertson K.C. replied.

The House took time for consideration.

1929. Feb. 25. LORD HAILSHAM L.C. My Lords, this is an appeal from an interlocutor of the First Division of the Court of Session, pronounced on appeal from a decision of the Sheriff-Substitute of Lanarkshire, whereby the appellants were ordered to pay to the respondent 100*l*. damages in respect of the death of the pupil son of the respondent, who received fatal injuries at the wheel pit of the haulage apparatus on the appellants' premises at View Park Colliery, Uddingston, on April 21, 1926. [His Lordship stated the facts and continued :]

The first and in my opinion the only question which arises for determination is the capacity in which the deceased child was in the field and at the wheel on the occasion of the accident. There are three categories in which persons visiting premises belonging to another person may fall; they may go

(1.) By the invitation, express or implied, of the occupier;

(2.) With the leave and licence of the occupier, and

(3.) As trespassers.

It was suggested in argument that there was a fourth category of persons who were not on the premises with the leave or licence of the occupier, but who were not pure trespassers. I cannot find any foundation for this suggestion either in English or Scotch law, and I do not think that the category exists.

The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category,

(1) [1912] 2 I. R. 290.

and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.

In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.

It was suggested in argument for the respondent that the cases of *Cooke* v. *Midland Great Western Ry. of Ireland* (1) and of *Lowery* v. *Walker* (2) showed that even towards trespassers the duty was higher than that which I have stated. In my opinion these two cases afford no ground for such a contention. In the case of *Cooke* v. *Midland Great Western Ry. of Ireland* (1) the railway company kept a dangerous turntable on their land close to a public road; the company knew that children were in the habit of playing on the turntable, to which they obtained easy access through a well-worn gap in a fence which the respondents were bound by statute to maintain; a child between four and five years of age having been seriously injured on the turntable, it was held that there was evidence for a jury of actionable negligence on the part of the railway company. Lord Macnaghten expressly treats the case as one in which the children were resorting to the turntable with the tacit permission of the railway company; Lord Atkinson says: "If the plaintiff

(1) [1909] A. C. 229, 235, 240, 241. (2) [1911] A. C. 10.

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entered upon these premises and played on this turntable with the leave and licence of the defendants, then these latter owed to the child a duty not to permit the machine to be in the movable and dangerous, because movable, condition in which they permitted it in fact to be." Lord Collins says: "I think all these facts in combination were evidence from which a jury might well infer not merely a licence, but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal"; Lord Loreburn agreed with the judgment of Lord Macnaghten expressly on the ground that the place was to the defendants' knowledge an habitual resort of children, and that the defendants took no steps to prevent the children's presence, but he regarded the case as "near the line" and the evidence as very weak. My Lords, in my opinion the decision in *Cooke's* case (1) rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap; it therefore throws no light upon the question as to any duty owed by the occupier of premises to a trespasser.

The case of *Lowery* v. *Walker* (2) was an appeal from the decision of a county court judge. The facts were that the respondent put a savage horse, which he knew to be dangerous to mankind, into a field which he knew people were in the habit of crossing on their way to a railway station, and that the plaintiff was injured by the horse when so crossing the field. The Court of Appeal treated the county court judge's judgment as amounting to a finding that the plaintiff was a trespasser, and accordingly decided in favour of the defendant. This House reversed the decision expressly on the ground that the county court judge's finding amounted to a decision that the plaintiff was in the field as a licensee. Lord Loreburn says: "I think that the effect of his finding is that the plaintiff was there with the permission of the defendant"; Lord Halsbury agrees; and Lord Atkinson says: "On the interpretation which I think is most rightly

(1) [1909] A. C. 229. (2) [1911] A. C. 10, 12, 14.

and properly put upon the findings of the learned county court judge, it is clear that the plaintiff was lawfully in the place where the injury happened to him." Lord Shaw expressly reserved any opinion as to the legal position if the plaintiff had been a mere trespasser. It is clear therefore that this case also affords no support to the respondent's contention. A like explanation of *Cooke's* case was most clearly given in the Court of Appeal in the judgment of Hamilton L.J. (as he then was) in *Latham* v. *R. Johnson & Nephew, Ld.* (1), a judgment with which I find myself in full agreement. Apart from these two cases, counsel for the respondent were bound to confess that they were unable to find any case, either in the English or in the Scotch Reports, which lent any support to the doctrine that there was any duty owed by an occupier to a trespasser apart from the duty not maliciously to cause him injury.

On the other hand, there is a number of decided cases in England, Scotland and Ireland to the contrary effect. So far as English law is concerned it is sufficient to refer to the case of *Hardy* v. *Central London Ry. Co.* (2), in which a child was injured on a moving staircase on the underground railway, where he had no right to be. Scrutton L.J. says: "If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers." My Lords, I believe that that sentence accurately summarizes the English law. In Ireland the law has been similarly stated in the Court of Appeal in the case of *Coffee* v. *McEvoy.* (3) The Scotch law seems to me to be the same and to be supported by a large number of authorities. In *Haughton* v. *North British Ry. Co.* (4), where children had been injured on the railway line in the course of shunting operations, it was held that the pursuers could only succeed in raising a relevant

(1) [1913] 1 K. B. 398, 419.
(2) [1920] 3 K. B. 459, 473.
(3) [1912] 2 I. R. 290.
(4) 20 R. 113.

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case by an averment which stated that the persons engaged in the shunting knew when they proceeded to shunt that the children were upon the line. In *Devlin* v. *Jeffray's Trustees* (1) Lord Kinnear says: "It was said that there is a doctrine admitted in the law of England which has not been received in our law, that when people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers, they must take care of themselves, and cannot throw any responsibility upon the persons on whose lands they have trespassed. If that is a correct statement of the law, I am of opinion that there is no such distinction as is supposed between English and Scotch law, and that this doctrine is just as clearly a part of our law as it is said to be of the law of England." In *Holland* v. *Lanarkshire Middle Ward District Committee* (2), where children who had been in the habit of playing upon a strip of waste ground got access to the defenders' ground through a gap in a fence and fell into a disused and unfenced quarry, the defenders were assoilzied on the ground that there was no duty on them to fence the quarry. In *Reilly* v. *Greenfield Coal and Brick Co., Ld.* (3), where a child had been injured at a level crossing, it was held that the company was responsible, because the child was lawfully on the road when the accident happened. In *Mackenzie* v. *Fairfield Shipbuilding and Engineering Co., Ld.* (4), where a child was killed by a fall of sand in a pit belonging to the defenders, the pursuer's averments were held relevant, because they contained a statement that the defenders knew of the children's practice of entering the ground and using the pit as a playground and allowed it, and the Lord Justice-Clerk says: "The real ground of liability as alleged is the fact that the defenders allowed the children to make use of the pit." In *Boyd* v. *Glasgow Iron and Steel Co.* (5), where a boy was killed by falling from the wall of a ruinous engine-house while

(1) 5 F. 130, 135.
(2) 1909 S. C. 1142.
(3) 1909 S. C. 1328.
(4) 1913 S. C. 213, 216.
(5) 1923 S. C. 758, 763, 764.

birds'-nesting, the Court of Session held that the pursuers had stated a relevant case for inquiry, because they averred that the defenders knew the condition of the building, and knew and tolerated the practice of children playing there. The Lord Justice-Clerk points out that on the pursuer's statement the pursuer's son was a licensee, and that, as such, it was the duty of the defenders to protect him against any concealed danger or trap; and Lord Ormidale says: "The pursuer's son . . . . was not a trespasser, but was doing what he did with the leave and licence of the defenders." Turning finally to the law as laid down by the Privy Council, we find in *Grand Trunk Ry. of Canada* v. *Barnett* (1), where the plaintiff was injured by a collision which took place on the appellants' railway line, it was held that the plaintiff could not recover because he was a trespasser on the train, and Lord Robson, in giving the decision of the Board that the defendants were not liable, states: "The general rule, therefore, is that a man trespasses at his own risk."

The only question, therefore, that remains for decision in this case is whether, upon the findings of fact of the Court of Session (which are not open to review), the respondent's son may properly be regarded as having been at the wheel at the time of the accident with the leave and licence of the appellants. If this had been proved, I should have been prepared to hold that the wheel, which was at times stationary and which was started without any warning, and which was, in the words of the Court of Session, "dangerous and attractive to children and insufficiently protected at the time of the accident," amounted to a trap, and that the respondent would therefore have been entitled to recover. But in my opinion, the findings of fact effectually negative that view. It is found that the appellants warned children out of the field and reproved adults who came there, and all that can be said is that these warnings were frequently neglected and that there was a gap in the hedge through which it was easy to pass on to the field. I cannot regard the fact that the appellants did not effectively fence the

(1) [1911] A. C. 361, 370.

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field or the fact that their warnings were frequently disregarded as sufficient to justify an inference that they permitted the children to be on the field, and, in the absence of such a permission, it is clear that the respondent's child was merely a trespasser. The sympathy which one cannot help feeling for the unhappy father must not be allowed to alter one's view of the law, and I have no doubt that in law the respondent's son was a mere trespasser, and that as such the appellants owed him no duty to protect him from injury. On these grounds I am of opinion that this appeal succeeds and must be allowed with costs, and I move your Lordships accordingly.

VISCOUNT DUNEDIN. My Lords, I am of the same opinion and might have contented myself with a simple concurrence, had it not been that the case is an important one, so that I thought it better to write my opinion before I had seen that of the Lord Chancellor.

I cannot do better than preface my remarks by a quotation from the exceedingly comprehensive and able judgment pronounced by Lord Sumner, at that time Hamilton L.J., in the case of *Latham* v. *Johnson* (1): "Where a question arises, not between parties who are both present in the exercise of equal rights inter se, but between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognized three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly though never very definitely measured. . . . . Contractual obligations of course stand apart. The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee. . . . . The owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him'; but otherwise a man 'trespasses at his own risk.' On this point Scotch law is the same. In

(1) [1913] 1 K. B. 398, 410.

English and Scotch law alike, when people come on the lands of others for their own purposes without right or invitation, they must take the lands as they find them, and cannot throw any responsibility upon the person on whose lands they have trespassed: per Lord Kinnear, *Devlin* v. *Jeffray's Trustees*. (1) The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they must run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril."

With every word of this passage I agree and I agree that it is the law of Scotland as well as that of England. What I particularly wish to emphasize is that there are the three different classes—invitees, licensees, trespassers. I think, in the Scottish cases at least, there has been a little laxity in distinguishing between invitees and licensees. The best test of who is an invitee is, I think, given by Lord Kinnear in *Devlin's* case. (1) He must be on the land for some purpose in which he and the proprietor have a joint interest. A licensee is a person whom the proprietor has not in any way invited—he has no interest in his being there—but he has either expressly permitted him to use his lands or knowledge of his presence more or less habitual having been brought home to him, he has then either accorded permission or shown no practical anxiety to stop his further frequenting the lands. The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to.

Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law. When you come to the facts it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category

(1) 5 F. 130, 135.

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will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, "bare licensees," "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.

Accordingly, in the present case the first query I put to myself is: Was this child a trespasser or a licensee? As to invitee, there is obviously no question. On this point I am bound to take the findings as they stand. Accorded permission is out of the case, but licence may be either expressed or implied. There is no finding in terms that licence was implied. Taking the situation as it is disclosed on the findings as a whole, I am of opinion that implied permission is not proved. It is here that I think this becomes a case of great importance. Judgments on this class of case are so numerous that it is impossible to review them all and a mere citation of a string of authorities is inimical to clear decision, but there are certainly to be found among them expressions which would countenance the idea against which I wish to raise my protest: that, unless a proprietor takes such measures as effectually to stop trespass, the trespasser becomes a licensee.

Something has been said about fencing. There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees. Of course, a proprietor may do nothing at all to prevent people coming over his lands and they may come so often that permission will be held to be implied, or he may do something, but that something so half-heartedly as to be equivalent to doing nothing. For instance, a mere putting up of a notice "No Trespassers Allowed" or "Strictly Private," followed, when people often come, by no further steps, would, I think, leave it open for a judge or jury to hold implied permission. But when a proprietor protests and goes on protesting, turning away people when he meets them, as he did here, and giving no countenance in anything that he does to their presence there, then I think no Court

has a right to say that permission must be implied. As I have said, circumstances vary infinitely and you cannot ab ante furnish a test which will fit every case; but it is permission that must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission. I, therefore, find that the child who met with an accident in this case was a trespasser.

I do not quote further from Lord Sumner's judgment in *Latham's* case. (1) In that case he was content to take the child as a licensee. On the duty to trespassers there is a considerable body of authority. There is no duty, save only that of not inflicting malicious injury. Lord Halsbury mooted the question in *Lowery* v. *Walker* (2), the case where the proprietor of a field where there was a frequented pathway put a horse which he knew to be vicious into the field. The county court judge had used the word " trespasser " and then in a subsequent note said that he did not mean trespasser in the legal sense, and Lord Halsbury says: " The learned judge did, I think inadvertently, in the first instance use the word 'trespasser,' which would have carried the learned counsel for the respondent [the proprietor] all the way he wants to get, to a somewhat difficult and intricate question of law upon which various views may be entertained." This does not lay down the law, but at least it shows clearly, even if it were doubtful before, that *Lowery's* case (2) was decided upon the view that the person injured was a licensee.

Later in the same volume came the Privy Council case of *Grand Trunk Railway of Canada* v. *Barnett* (3), where a trespasser on a railway company, a trespasser by having taken his place in a train not meant for passengers, was held not entitled to recover for the negligence of the servants of the proprietors of the line which had caused an accident. The judgment of Lord Robson is a little confused as to *Lowery* v. *Walker* (2), but that does not affect the judgment.

(1) [1913] 1 K. B. 398. (2) [1911] A. C. 10, 12.
(3) [1911] A. C. 361.

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Then there is the case of *Hardy* (1), the case of the moving staircase. That had been decided by the Court below as the case of a licensee. The Court of Appeal on the facts held that the child was a trespasser not a licensee and found for the defendants. Bankes L.J. there says: "If the plaintiff was a trespasser then he has no right of action, as there is no evidence of any allurement with malicious intent to injure," and quotes Hamilton L.J. in *Latham* (2) and Lord Robson in *Grand Trunk Ry.* (3) Warrington L.J. takes the same course. Scrutton L.J. says: "If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

These are English cases. In Scotland in the case of *Thompson* (4), a man who had jumped into the guard's van without a ticket was held to have no case against the railway company for damages caused in respect of a collision occasioned by the negligence of the company's servants. Then came the case of *Devlin* (5), from which Hamilton L.J. made the quotation in *Latham's* case with which I began, but it is worth remarking that Lord Kinnear's dictum is stronger than the quotation, which omits a few words. The actual words of Lord Kinnear were: "When people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers, they must take care of themselves, and cannot throw any responsibility upon the persons on whose lands they have trespassed."

Then the case of *Cummings* v. *Darngavil Coal Co.* (6) is exactly the same as the present case. There there was the contrivance of a wheel set in motion from time to time to

(1) [1920] 3 K. B. 459, 466, 473.
(2) [1913] 1 K. B. 398.
(3) [1911] A. C. 361.
(4) (1882) 9 R. 1101.
(5) 5 F. 130, 135.
(6) 5 F. 513, 517.

haul trucks over the bing. The place was known to be frequented by children, who strayed in from a public road within eighteen yards of the wheel, but the case was held irrelevant. I have, indeed, considerable doubt whether on the averments there ought not to have been allowed an inquiry as to whether the child was a licensee, but on the assumption that he was a trespasser, the case is a direct authority. Lord Trayner says in so many words: "I agree entirely with what Lord Kinnear said in the case of *Devlin*. (1) I think that if the case set forth on record is a case of trespass, the trespasser must take the risk of trespass—that he must take all risks incidental to his use of another's property." Lord Young says—this has a direct bearing on a former part of my opinion: "I do not know of any law, and none was cited to us, which puts a duty on a proprietor to fence his property so as to prevent trespassers from running into danger through the working of machinery, which he is quite legitimately using on his property." So far the positive authority, but then comes the cogent fact that the respondent's counsel was unable to produce any case in which there was laid down any duty towards a trespasser except that of abstaining from maliciously injuring him. He could only quote various pronouncements as to the special duty of care towards children of tender years, but these pronouncements were all either in cases of licensees, or in the class of case which may at once be put aside, in which the injured person, though on land belonging to the defender, is at a place on a road where the public has a confirmed habit of passage—e.g., *Reilly* v. *Greenfield Coal and Brick Co.* (2) At first sight the case of *Haughton* v. *North British Ry. Co.* (3) might seem an authority. The facts were that there was a railway siding adjoining a public square, from which it was separated by a fence and a gate. The gate was left open, children strayed through on to the siding, shunting operations were going on and a child was killed. Lord Adam specially states that the child was a trespasser and an issue was allowed, Lord M'Laren dissenting. But when the case is more narrowly

(1) 5 F. 130, 135. (2) 1909 S. C. 1328.
(3) 20 R. 113.

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looked into it is really an authority all the other way. When the case was first brought there were only averments of carelessness in leaving the gate open and allowing the children to get into danger and these were held irrelevant, but the pursuer was given the opportunity to amend. He did amend, and it was only the last sentence of his amendment which made Lord Kinnear, who, be it remembered, had said what he had in *Devlin's* case (1), and the Lord President hold that it was relevant. That sentence set forth that the defenders' servants who began the shunting knew that the children were on the line; in other words, that was malicious injury to a trespasser. The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement. Allurement, I take it, is just the bait of the trap, itself a figurative expression. Hamilton L.J. deals with these expressions in *Latham* (2), and I need not quote, but obviously what is allurement and a trap to a child is not so to an adult. And then you have the doctrine of contributory negligence affecting an adult but not affecting a very young child. To take concrete instances: the learned judges in *Hardy's* case (3), the moving staircase, say explicitly that, if they could have held the children to be licensees, they would have held the defendants liable; yet an adult would have found no allurement in playing with the strap. In the present case, had the child been a licensee I would have held the defenders liable; secus if the complainer had been an adult. But if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head—injury either directly

(1) 5 F. 130, 135. (2) [1913] 1 K. B. 398.
(3) [1920] 3 K. B. 459.

malicious or an acting so reckless as to be tantamount to malicious acting.

My Lords, I concur in the motion made.

LORD SHAW OF DUNFERMLINE (read by LORD BLANESBURGH). My Lords, the facts of the case have been stated by your Lordships who have preceded me. The substance of them is as follows. The appellants, who are colliery owners, are proprietors of the field in which there is haulage machinery working over a considerable extent of ground. Part of this machinery consists of an endless chain passing at its outer end over a horizontal pulley and working very near the ground. By means of this apparatus the waste from the pit mouth can be distributed in bings from hutches hauled by the chain.

The field adjoins a public road, in what has for a period of years been a populous neighbourhood. The field is quite insufficiently fenced from the road, there being large gaps in it. It has been for a considerable period traversed on occasion as a short cut to a chapel and a railway station, and has been often used by children as a playground. To these the moving apparatus was an attraction. This invasion has not been consented to by the owners. On the contrary they have frequently warned trespassers from the ground. They were aware however that these warnings were ineffectual and that the trespass continued.

The machinery when in motion was dangerous. The owners gave no special warning when it was put in motion and neither fenced the field nor the machinery. They did not appoint a watchman to warn off intruders or to give notice of the starting of the chain and hutches.

Upon these facts, had the question of principle been open, it is plain that a delicate question might have arisen as to the duties of public and of owner respectively or mutually. A perusal of the most careful judgment of the learned Lord President makes this plain. His Lordship says: "I think it is clear that the defenders owed a duty to the pursuer's child to prevent any accident occurring to him by reason of

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the pulley wheel because he was a member of a class of persons whom the defenders knew to be in the habit of resorting to the field and the near neighbourhood of the haulage system." His Lordship founds upon the failure sufficiently to fence the field, saying with much force: "The point is not that the fence should be impenetrable or unclimbable, but that it should present an obstacle to an invader, adult or infantile, which the invader must consciously overcome," while with regard to the moving machinery and the danger caused by that to trespassers he adds: "I think it is clear that while nothing in the shape of positive permission for public resort to the field and the neighbourhood of the pulley wheel can be charged against the defenders, they did but little to prevent it and knew that what they did do was ineffectual."

My Lords, I can hardly figure the considerations in support of the view of an owner's liability in such cases being more clearly stated than in the sentences which I have taken the liberty to quote.

But, my Lords, I need express no opinion upon the general question, for I think it to have been concluded by legal authority. When I reach that point I do not find that there is any difference between the laws of England and Scotland; and having considered the decided cases very fully I am humbly of opinion that the dissenting opinion of Lord Blackburn must be preferred.

Excluding, as of course I do, all instances of loss and injury wilfully inflicted, I am of opinion that the digest of the decided law of England and Scotland on the point under consideration is compressed in the few words of Lord Kinnear in *Devlin's* case (1), when he says: "When people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers, they must take care of themselves and cannot throw any responsibility upon the persons on whose lands they have trespassed."

I agree.

(1) 5 F. 130, 135.

LORD BUCKMASTER. My Lords, it is essential in considering this case first to determine in what capacity the child was upon the appellants' premises when the most lamentable accident occurred which robbed it of life and, secondly, to keep clearly in mind the distinction between a moral and a legal obligation.

The conclusion to my mind is irresistible, that the child, who could know nothing of the law of trespass or licence, was in fact a trespasser. The only alternative to that conclusion is that the child was there by licence. Licence may either be express or implied by conduct. Express licence is out of the question in the present case and I can find no sufficient material from which it can be implied. There is nothing in the findings to show that the presence of children upon this spot was ever sanctioned by the appellants. It is quite true that there was a large unfenced gap through which children might reasonably be expected to wander and it may have been that a few strands of barbed wire would at a little cost have prevented their entrance, but there was no legal obligation to establish such a barrier and it is only the legal obligation with which we are concerned. The learned Lord President, who gave judgment against the appellants, admitted there was no duty to fence, but said that the fact that the owner allows the fence enclosing his private property to fall into more or less permanent disrepair has a certain evidential value on the question whether he consented to the use of his property. That, I think, is true, but by itself it cannot amount to a licence, and the best that can be urged in favour of the respondent is that the appellants were aware that the children disregarded the warnings which from time to time were given by the appellants' employees and continued to frequent the field. There is, however, no evidence that they were tacitly permitted to do it and nothing which, in my judgment, can justify the inference that the appellants so acquiesced as to cause the use of the field by the children to be lawful.

It is this fact that is the clear distinction between the present case and the case of *Lowery* v. *Walker* (1), where this

(1) [1911] A. C. 10.

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House held that the circumstances relating to the use of land by a person injured upon it amounted to a licence, which threw upon the owner of the land the duty of taking steps to avoid the existence of a danger due to the presence of a fierce animal.

If it once be held that the child was a trespasser, innocent as the trespass was, there was no legal duty cast upon the appellants to afford protection against the danger which they must have known use of the land by the children almost necessarily involved. The cases have already been examined and there is no need to discuss them anew. I agree in thinking that they show that in the circumstances of this case there was no legal duty cast upon the appellants to guard against the deplorable consequences out of which these proceedings have arisen.

LORD HAILSHAM L.C. My Lords, my noble friend Lord Carson asks me to say that he concurs in the judgments which have been delivered.

Interlocutor of the First Division of the Court of Session in Scotland reversed and cause remitted back to the Court of Session with a direction to sustain the second plea in law for the defenders and to assoilzie the defenders and to do therein as shall be just and consistent with this judgment. The respondent to pay the costs before the Sheriff-Substitute and in the Inner House of the Court of Session and also the costs of the appeal to this House.

Lords' Journals, Feb. 25, 1929.

Agents for the appellants : *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent : *Geo. Brown, Son & Vardy, for John W. Snodgrass, Glasgow, and Alex. Campbell & Son, S.S.C., Edinburgh.*

NOTE.—It is observable that a decision of the Supreme Court of the United States delivered by Holmes J. in 1922, *United Zinc & Chemical Co.* v. *Britt*,

258 U. S. 268, is exactly in point. The case was rather stronger than the present one, inasmuch as the danger arising from a pool of clear-looking water being poisoned by chemical refuse was not apparent even to adults. "There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there. . . . . A road is not an invitation to leave it elsewhere than at its end": p. 276. There was no proof of habitual trespassing, but a minority including Taft C.J. held that on the whole there was sufficient evidence of implied invitation to support the verdict of a jury.—F. P.

Applied. ARIS-BAINBRIDGE v. TURNER [1951] 1 K. B. 563

[HOUSE OF LORDS.]

Applied. ARIS-BAINBRIDGE v. TURNER MFG. CO., LTD. [1950] 2 All E.R. 1178.

J. GLIKSTEN AND SON, LIMITED . . . APPELLANTS; H. L. (E.)*

1929

Feb. 22.

AND

GREEN . . . . . RESPONDENT.

Revenue—Income Tax—Insurance against Fire—Loss of Stock in Trade by Fire—Insurance Money exceeding Amount at which Stock in Trade valued in Books—Inclusion of whole in Profit and Loss Account as a trading Receipt—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *Sch. D, Case I.*

A quantity of timber belonging to a company carrying on business as timber merchants was destroyed by fire. In the company's accounts the timber was valued at cost or market value, whichever was the lower, and for this purpose large sums were in the last two years of account before the fire written off the cost price in respect of depreciation in order to arrive at the closing stock values. The reduced sums so arrived at were adopted each year in order to arrive at the company's profits for income tax purposes. The company kept its stock in trade insured against loss or damage by fire; and for the purpose of fire insurance the stock in trade was valued at replacement value. At the date of the fire the value of the stock destroyed was very high owing to a boom, and the insurance companies paid 477,838*l.* in respect of the replacement value. The sum of 160,824*l.* was the estimated book value of the timber destroyed. This sum was brought into the company's accounts as a trading receipt, and the balance of the sum of 477,838*l.* (after some small deductions) was carried into the balance sheet as a reserve and was not brought into the profit and loss account:—

Held, that the company must bring the whole of the money received from the insurance companies in respect of the timber destroyed by

* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, and LORD WARRINGTON OF CLYFFE.

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fire into their profit and loss account as a trading receipt in order to arrive at the company's profits for income tax purposes.

Decision of the Court of Appeal [1928] 2 K. B. 193 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.) (1) affirming a judgment of Rowlatt J. (2) reversing a determination of the Commissioners for the Special Purposes of the Income Tax Acts.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

The arguments in support of the appeal were the same as in the Court below.

The respondent's counsel were not called upon.

Macmillan K.C., *Latter K.C.* and *Cyril King* for the appellants.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondent.

LORD BUCKMASTER. My Lords, the appellants are timber merchants who carry on their business at Stratford, near London. In August of 1921 they had a large quantity of timber stored upon their premises, and on the 8th of that month a fire broke out and destroyed a considerable quantity of the appellants' goods. The goods had, in the due course of their business, been insured, and as the result of the insurance the appellants received 477,838*l.* from the insurance companies. But the timber had stood in their books and balance sheets as representing the figure of 160,824*l.*, and accordingly the appellants sought to bring only that latter figure in for the purposes of assessment to income tax, while the Inland Revenue authorities asserted that they were bound to bring in the larger sum.

The accounts of the appellants' business are set out and they show that the ordinary method of accounting is followed. They bring in on the debit side of their balance sheet the stock in trade they have at the beginning of the year, the

(1) [1928] 2 K. B. 193. (2) [1928] 1 K. B. 475.

amount they purchase, the various charges that they incur in connection with it, and, on the other side, their sales and their stock in trade at the end of the accounting period. It therefore follows that if, in the place of stock in trade that was brought forward on the credit side they introduced this 477,000*l.*, there would be a large sum of profit which would be liable to assessment for tax. In point of fact the way in which they sought to bring it in was by entering the figure merely under the head of "Timber destroyed at estimated cost prices" at the lower sum of 16,000*l.*

My Lords, the Special Commissioners thought that they were right in that course: Rowlatt J. and the Court of Appeal have unanimously thought that they were wrong.

The appellants seek to fortify their argument by a consideration of the Rules that apply to Sch. D under the Income Tax Act, 1918. They point out that under that Schedule the tax is to apply to a trade and is to be computed on the amount of the profits and gains of the trade; and they say that whatever was received in relation to this fire was not a profit or gain of the trade, but that it was something received from the insurance, that the real business that they were carrying on was not that of insuring the timber, but its purchase and its sale. Further they say that by sub-head (*k*) under r. 3 of the rules applicable to Cases I. and II. there is an express provision that there shall not be deductible from the profits and gains any sum recoverable under an insurance or contract of indemnity, and they suggest that that means that by implication there is a prohibition against bringing in on the other side the moneys that are received under such a contract. My Lords, I am quite unable to take that view. All that sub-head (*k*) does is to prevent them from bringing in a loss which they have incurred that is covered by insurance, when, in fact, the amount of that loss is capable of being recovered by the policy moneys that they may receive; it goes no farther than that and, so far as it does extend, it is, I think, destructive of that part of the argument of the appellants which consisted in saying that, if they were

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bound to bring in the moneys that they received from the insurance company on the one hand, they could bring in the equivalent amount of losses on the other; this subsection, which is in language not specially ambiguous, has expressly provided that they shall not do anything of the kind.

There remains this question: Ought the total amount of these insurance moneys to be regarded as part of the profits and gains of the trade? My Lords, in my opinion they ought, and for this reason: What has happened has been this, that the timber which the appellants held has been converted into cash. It is quite true it has been converted into cash through the operation of the fire, which is no part of their trade, but loss due to it is protected through the usual trade insurances, and the timber has thus been realized. It is now represented by money, whereas formerly it was represented by wood. If this results in a gain, as it has done, it appears to me to be an ordinary gain—a gain which has taken place in the course of their trade—none the less because, as Mr. Macmillan put it, and as I think Sir John Simon before him appears to have put it, it is no part of a timber merchant's business to trade in fires. I think that a few words in the judgment of Sargant L.J. express the whole matter in a sentence, and to them it is unnecessary to add anything more. He says (1): "To my mind the book value of the timber in the company's books has nothing at all to do with the amount of the loss or with the amount which has been recovered in respect of the loss. The amount recovered is a gain of the company in the course of its business no less than the sale price of the timber would have been, if the timber had been sold in the course of ordinary sales during the continuance of the company's business; and in estimating the balance of the profits or gains which the company has to bring into account for the purposes of income tax, the amount of the excess of the sum recovered over the book value of the timber in the company's books has to be brought into account just as fully and completely as if there had been a sale in the ordinary course of business at that price."

(1) [1928] 2 K. B. 204.

My Lords, for these reasons I think that this appeal should be dismissed.

Viscount Dunedin. My Lords, I agree. In these income tax cases one has to try, as far as possible, to tread a narrow path, because there are quagmires on either side into which one can easily be led, and I think into one of these quagmires we were tempted to be led when the argument turned upon the question of what you were entitled to debit or not. I do not think this case has anything to do with debiting losses. The whole point is that the business of the company is to buy timber and to sell timber, and when they sell timber they turn it into money. This particular timber was turned into money, not because it was sold, but because it was burned and they had an insurance policy over it. The whole question comes to be whether that is a turnover in the ordinary course of their business. I think it was. They had that amount of timber, which they got rid of and for which they got a certain price, and then they could begin again. The more times you have a turnover—that is to say, the more sales you can get, provided that you are carrying on business at remunerative prices—the better for you. The result of this fire was that they got rid of so much timber and got the insurance money at that figure, and that seems to me precisely in the same position as if they got rid of it by giving it to a customer. If that is so, that is exactly the view of Rowlatt J., and I think he arrived at the right result.

Lord Warrington of Clyffe. My Lords, I agree, and I have nothing to add except to say that to me, at all events, it is some comfort to think that the decision we are giving is in accordance with the commercial practice, because I notice that the chartered accountant who alone gave evidence on the point says that in his experience as a chartered accountant extending over twenty years the normal commercial method of dealing with moneys recovered by a trader under a policy of insurance in respect of stock destroyed by fire was to include

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the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 22, 1929.

Solicitors for the appellants: *Ward, Perks & Terry.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1929 *March* 18.

HAGART AND BURN-MURDOCH . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Income Tax—Balance of Profits and Gains—Deductions—Writer to the Signet—Loss on Loans to Clients—Money wholly and exclusively laid out for Purposes of Profession—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3.

A firm of writers to the signet advanced money from time to time without security and without any written acknowledgment to a limited company for which they had acted as law agents since its inception. The company failed, and the advances were irrecoverable. On an appeal to the General Commissioners from an assessment to income tax under Sch. D, the firm claimed that the amount of the advances was a permissible deduction in ascertaining their profits and gains as writers to the signet. The Commissioners found that the advances were made in the course of the relation of solicitor and client, and that the firm were in the habit of making advances to clients without security, and they allowed the appeal:—

Held, that the loss was not a permissible deduction, as it did not represent moneys wholly and exclusively laid out or expended for the purposes of the firm's profession within the meaning of r. 3 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918.

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* *Present:* LORD BUCKMASTER, LORD SHAW OF DUNFERMLINE, and LORD WARRINGTON OF CLYFFE.

APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the county of Edinburgh.

The appellants, a firm of writers to the signet, appealed against an estimated assessment to income tax made upon them under Sch. D for the year 1925–26 in respect of their profits as law agents and claimed a deduction of 2615*l.*, representing a loss sustained by them in connection with advances made to a limited company (hereinafter referred to as "X Limited"). The facts stated in the case were substantially as follows. Early in 1923 the appellants were consulted by clients who were interested in promoting a company for the manufacture of a new metal alloy. The company was to be an experimental one, and, upon the successful manufacture being established, a large public company was intended to be promoted for the marketing of the metal, and a large amount of legal business was anticipated. An experimental company (called "X Limited") was incorporated on May 2, 1923, with a nominal capital of 10,000*l.*, and the appellants carried through the legal business of the incorporation and became the company's law agents. They held no other office in connection with it.

During the years 1923 and 1924 they made advances to the company of a total amount of 2615*l.* without security and without any written obligation to pay. They were made from time to time as required by the company for temporary purposes.

The new metal was manufactured and tested, but it was found impossible to attain a uniform standard of the metal, and in consequence the project failed. The advances of 2615*l.* were irrecoverable, and the appellants had written off the loss in their profit and loss account for the year 1924.

The appellants as a firm held no shares in the company. At the time the advances were made one of the partners held one share of 1*l.* in order to qualify as a director, and another partner held 250 shares of 1*l.* each as an investment.

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The appellants did not pay for these shares, and the sole relations between them and the company were those of solicitor and client, in the course of which they also became creditors for the advances above mentioned.

The appellants were in the habit of making advances to clients when required without security. Six instances were given of advances to clients varying in amount from 317*l.* to 7553*l.*, in five of which no security was given. Except in the case of the advance for 7553*l.*, which was stated to be made to enable a landowner to purchase sheep, no account was given of the specific purpose for which the advance was made, but it was stated generally that some of these advances were made to commercial firms for whom the appellants acted, and that they had made advances to clients other than X Limited in circumstances and for purposes similar to the advances of 2615*l.* The Commissioners asked whether further inquiry as to the firm's practice in regard to advances to clients and as to the nature and circumstances of the advances was desired, but the Inspector of Taxes stated that he did not desire such inquiry. The Commissioners allowed the appeal. The question of law for the opinion of the Court was whether the firm were entitled to deduction of the 2615*l.*

The First Division (the Lord President, Lord Sands, Lord Blackburn and Lord Morison) answered this question in the negative and sustained the appeal.

1929. March 1. *Condie Sandeman D.F.* (with him *J. S. C. Reid* (of the Scottish Bar)) for the appellants. The language of r. 3 of the Rules applicable to Cases I. and II. of Sch. D simply raises a question of fact which the Commissioners have decided in favour of the appellants. The Commissioners have found that the advances to the X company were made in the course of the relationship of solicitor and client, and that this was the sole relationship existing between the appellants and the company, and, further, that the appellants were in the habit of making advances to clients without security. These findings amount to a finding of fact, that the said sums were wholly and exclusively laid out by the

appellants for the purposes of their business, and that the loss was connected with and arose out of their business within the meaning of the rule. This loss is therefore a proper deduction to be made in ascertaining the profits and gains of the business. There is ample material to justify the finding that this firm did carry on in conjunction with their solicitors' business the business of lending money: *Usher's Wiltshire Brewery* v. *Bruce* (1); *Reid's Brewery Co.* v. *Male* (2); *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (3); *Mitchell* v. *B. W. Noble, Ld.* (4); *Morley* v. *Lawford & Co.* (5) *British Insulated and Helsby Cables* v. *Atherton* (6) is distinguishable. There was there no question of habit, but it was a case of a capital payment once for all to get a benefit for the business.

Right Hon. William Watson L.A. (*Sir Thomas Inskip A.-G.*, *MacRobert S.-G.* for Scotland, *Reginald Hills* (of the English Bar) and *A. N. Skelton* (of the Scottish Bar) with him) for the respondents. It is said that money-lending was incorporated in the appellants' business. But there is no finding to that effect. It is not shown that these advances were made in connection with any business which was being done with the clients at the time.

This sum of 2615*l.* is not a proper deduction, first, because it was not wholly and exclusively expended for the purpose of the appellants' profession; secondly, because the loss was not one connected with or arising out of the profession, and, thirdly, because the sum represented capital expenditure.

Condie Sandeman D.F. replied.

The House took time for consideration.

March 18. Lord Buckmaster. My Lords, the appellants are a firm of writers to the signet at Edinburgh. In 1923 certain of their clients were interested in the development and manufacture of a new metal alloy, and having

(1) [1915] A. C. 433, 457, 468, 469.
(2) [1891] 2 Q. B. 1.
(3) [1914] 3 K. B. 674.
(4) [1927] 1 K. B. 719.
(5) (1928) 45 Times L. R. 30.
(6) [1926] A. C. 205.

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decided to promote a company to experiment with this invention they instructed the appellants to undertake the necessary legal business. This the appellants did, and the company was duly incorporated on May 2, 1923, with a nominal capital of 10,000*l.* in 1*l.* shares. The appellants became law agents of the company. One of the partners held a 1*l.* share, which qualified him as a director, and another acquired as a private investment 250 further shares; but the appellant firm held no office or shares, and their relationship to the company was professional.

During the years 1923 and 1924 the appellants advanced to the company sums amounting in all to 2615*l.* without security and without written acknowledgment. There can be no doubt that the appellants believed that there would be future extensive developments of the company's operations, and they may well have regarded the assistance they gave as likely to secure for them future profitable business. These hopes were unfortunately doomed to disappointment; the company failed, and the moneys are wholly irrecoverable.

In these circumstances the appellants sought, in their income tax returns for the year 1925–26, to bring the sum of 2615*l.* into account as a loss to be properly debited on ascertaining their profits and gains under Sch. D of the Act of 1918. They were, however, assessed at a figure excluding this deduction; they successfully appealed against the assessment to the General Commissioners, but their finding was reversed by the Court of Session, against whose judgment this appeal has been brought.

The principles to be relied on in determining how the assessment is to be made under Sch. D have often been discussed. The profits and gains have to be determined in the manner proper to the particular business or profession under review, but apart from any general principles applicable to such determination, the following negative provisions are to apply.

"*Rules applicable to Cases I. and II.*

"1.—(1.) The tax shall be charged without any other deduction than is by this Act allowed. . . . .

"3.—In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of

"(*a*) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation; . . . .

"(*e*) any loss not connected with or arising out of the trade, profession, employment or vocation;

"(*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation."

The question, therefore, is, ought this sum to be deducted in ascertaining the profits and gains of the business as carried on by the appellants as writers to the signet; and if this were so, apart from statutory prohibition, is the allowance excluded by the restrictions already quoted?

Now it appears that the loans under consideration are not isolated instances of such transaction. The Commissioners have found that the appellants are "in the habit of making advances to clients when required without security," and certain instances are given.

The facts and circumstances in which the loans were made are not analyzed; it is not even stated whether they bore interest or not, and except in one case, where the loan was to purchase sheep, the object of the loan is not disclosed. It must, therefore, be taken that in the present case there was no question of advances being made in the strict and usual course of professional work, as, for example, in making payments to defray expenses in connection with a law suit or the purchase of property. The present position is strictly limited by the words of the finding: "The sole relations between them and the company were those of solicitor and client, in the course of which they also became creditors for the advances above mentioned."

In my opinion the loss of money so advanced cannot be treated as a loss in ascertaining the profits and gains of the profession of writer to the signet; and if it could be so regarded without the restrictions of the rules, I think it is

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excluded by r. 3 (*a*) or (*e*). It was, in fact, a separate venture from that of writers to the signet, and even if undertaken in the hope and expectation that it would help their business, it was none the less no part of their true profession.

I agree with the criticism of the Dean of Faculty that in the present case to consider whether the source from which the moneys came was capital or income is not to apply the true test. In this instance it is the application of the moneys and not their origin that provides the real criterion.

No decided case lends much aid to this decision. The nearest is that of *Reid's Brewery Co.* v. *Male* (1), where moneys advanced by a brewery to tenants were held to be properly deducted; but in that case the Commissioners found as a fact that "such loans and advances were essentially necessary," and without them the business could not be carried on at a profit. It was held that, as the result, the brewery and money-lending business was one, and that the money was laid out exclusively for the purposes of the brewery trade. The findings in the present case do not approach, even remotely, such a situation. The case of *Morley* v. *Lawford & Co.* (2), where moneys paid under a guarantee given for the express purposes of obtaining trade were held properly deducted, depended largely upon the very express findings of fact of the Commissioners that the moneys were expended "wholly and exclusively for the purposes" of the trade; and the present case, though quoted in support of the Crown, was distinguished on sound grounds by Greer L.J. It is unnecessary, therefore, to express any opinion as to the correctness of that decision.

In the present case the findings are confined to the bare statement that the advances were made "in the course of" the relation of solicitor and client, and that this was in accordance with a habit. This to my mind is insufficient. Lending money to clients may often be done by writers to the signet, but it is no essential and necessary part of their profession, and if a case ever arose in which it could be held that money-lending and the profession had become one and

(1) [1891] 2 Q. B. 1. (2) (1928) Tax Leaflet, No. 403; 45 Times L. R. 30.

the same business, it would require a special finding of facts to that effect before the position could approach that of the cases quoted. Apart from this, it is also true that as factors of an estate or for special purposes money may be advanced by writers to the signet under such conditions that its loss would be a proper element in determining the balance of profits and gains ; but the facts as found here do not establish any of the special conditions necessary to blend these payments with that of the profession in which the appellants were engaged.

For these reasons I am of opinion that this appeal should fail.

Lord Shaw of Dunfermline. My Lords, as recorded by the case stated by the Commissioners :—

The respondents (the present appellants) are a firm of writers to the signet in Edinburgh, that is to say, their business is that of solicitors. In 1923 they were consulted by clients interested in promoting a company for the manufacture of a new metal alloy. The case also states that " a large amount of legal business was anticipated." In point of fact :—

" An experimental company called 'X Limited' was incorporated on May 2, 1923, with a nominal capital of 10,000*l.*, and the respondents carried through the legal business of the incorporation and became the company's law agents. They held no other office in connection with it.

" During the years 1923 and 1924 they made advances to the company to a total amount of 2615*l.* The advances were made without security and without any written obligation to repay. They were made from time to time in varying sums as required by the company for temporary purposes."

In the end the project collapsed. The sums advanced are irrecoverable. The question of law submitted by the Commissioners for the opinion of the Court " is whether the respondents are entitled to deduction of the said sum of 2615*l.*"

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I am of opinion that it cannot be so allowed as a deduction for the reason maintained by the inspector of taxes before the Commissioners and recorded thus :—

"That the loss could not be allowed as a deduction as it did not represent moneys wholly and exclusively laid out or expended for the purposes of the respondents' profession within the meaning of r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918."

If necessary I should also hold that the loss could not be allowed as a deduction within the meaning of r. 3 (*e*), as it was not a loss connected with or arising out of the appellant's profession.

It was admitted by the Learned Dean of Faculty that the transaction was not an ordinary incident of legal business.

It was however maintained that the deduction in the present case was legitimate, first on the ground of custom, and second on the ground of law approved especially in *Usher's Wiltshire Brewery* v. *Bruce.* (1)

Sect. 209, sub-s. 1, of the Income Tax Act, 1918, provides: "In arriving at the amount of profits or gains for the purpose of income tax :—

(*a*) no other deductions shall be made than such as are expressly enumerated in this Act ; . . . ."

The following are extracts from the Rules of Sch. D :—

Rule applicable to Case II.

"The tax . . . . shall be computed on the full amount of the balance of the profits, gains and emoluments of the professions, employments or vocations . . . ."

Rules applicable to Cases I. and II.

"1.—(1.) The tax shall be charged without any other deduction than is by this Act allowed.

3.—In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of

(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation ; . . . .

(1) [1915] A. C. 433, 455, 458.

(*e*) any loss not connected with or arising out of the trade, profession, employment or vocation;

(*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation . . . ."

In these cases it is desirable if possible not to extend the ground of judgment. In my opinion one ground is sufficient and is very clear in the present case. I do not think that the advance of 2615*l.* was wholly or exclusively laid out for the purposes of the appellants' profession of solicitor. Accordingly it is illegitimate in computing the amount of profits or gains to be charged to deduct the sums stated, as Rule 1 (3.) (*a*) expressly forbids such a deduction being made. The same result reached from the point of view of loss would have been reached under sub-head (*e*): but it is sufficient to decide the case on the former ground, as taken by the inspector of taxes.

As to custom: While it was admitted that loans or advances of such a kind were not an ordinary expenditure of a solicitor's business, it was maintained in argument that they became so in the case of the appellants, because they were themselves in the habit at times of lending money to their clients with or without security. Several instances in which they did so are cited, and are, of course, quite truthfully set down. A Court is not concerned with the motives for such transactions—which may spring from personal interest or from generosity or from a sense of favours to come—but it is in the highest degree doubtful whether any custom could avail to bring banking or money-lending within the scope of a solicitor's business, and it is beyond all doubt that no custom can rest upon what an individual solicitor himself did.

Nor do I think it advisable to express any opinion upon the case alluded to, of a solicitor's business being mixed up with a factorial agency. That would in the individual case require separate investigation, and the present is not a case of that kind. I make the same observation upon a point raised and referred to in the judgment below as to capital withdrawn or presumably withdrawn from or intended to be employed as

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capital in the appellants' profession. That would introduce a consideration of sub-head (*f*) already quoted. Whether it was so withdrawn or from what source it came has in truth nothing to do with the question which arises in this case, which rests upon rule 3 (*a*)—namely, whether the advances were made wholly and exclusively for the purposes of the solicitor's business.

There remains only reference to the case law, and particularly to the case of *Usher*. (1) For the reason stated above the decisions on the "capital" cases as such and referable to (*f*) are not in point.

The case of *Usher* (1) has already been referred to. On the facts it was an instance of an ordinary tied house transaction, and it was held that where advances were made by a landlord who was a brewer and allowed by him to the tenant of a tied house as an incident of the profitable working of the brewery business, the deduction could be made. As Lord Atkinson said: "The publican's trade is the vending of the landlord's beer and none other. The house is the market place for that beer and none other. The brewer takes the house, ties it to his brewery, and puts the publican into it as tenant for the very purpose of having his beer sold in that market through the efforts of this salesman, the tied tenant." I quote Lord Atkinson's words to show how plainly the language of the statute could be held to justify a deduction in such a case. These advances exactly fitted sub-head (*a*). They were wholly and exclusively laid out or expended for the purposes of the trade, and equally any loss on those advances would be connected with or would have arisen out of the trade.

It must be remembered that the duty chargeable is computed "on the full amount of the balance of the profits gains and emoluments of the profession, employment or vocation," and, as Lord Parker in an observation with which I respectfully concur, observed, "the expression 'balance of profits and gains' implies, as has often been pointed out, something in the nature of a credit and debit account, in which the receipts appear on the one side and the costs and expenditure necessary

(1) [1915] A. C. 433, 455, 458.

for earning these receipts appear on the other side." It is quite impossible to appeal to that case in an instance like the present, or to maintain that the advances made by way of unsecured loan to a client were items of expenditure or debit necessary for earning the receipts of a solicitor's business.

In my view the appeal to decisions fails, and the statute is in substance clear. I agree that the appeal fails.

LORD WARRINGTON OF CLYFFE (read by VISCOUNT DUNEDIN). My Lords, the appellants, Messrs. Hagart & Burn-Murdoch, are a firm of writers to the signet carrying on business in Edinburgh. In the years 1923–4 they had amongst their clients a company, referred to in the proceedings as X Ld. To this client they made from time to time advances in money without security amounting altogether to 2615*l.* The money was advanced, as required by the company, for temporary purposes.

The company had been formed for the purpose of experimenting in, and if possible perfecting, the manufacture of a new metal, which it was hoped would prove of great value, and with the intention in the event of success of promoting a large public company for marketing the metal. A large amount of legal business was anticipated from such promotion. The scheme, however, proved a failure, X Ld. collapsed, and the 2615*l.* was irrecoverable.

In their return for the purposes of income tax under Sch. D in respect of the profits and gains from their business as writers to the signet the appellants claimed to be allowed a deduction in respect of the loss of the 2615*l.* This claim having been rejected by the Commissioners for Inland Revenue, the appellants appealed against the assessment to the Commissioners for General Purposes of Income Tax. The appeal was allowed, and the Commissioners at the request of the inspector of taxes stated a case for the opinion of the Court of Session as the Court of Exchequer in Scotland, the question submitted being whether the appellants were entitled to deduction of the said 2615*l.*

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On June 21, 1928, the case was heard by the Lords of the First Division, who answered the question in the negative. Hence the appeal to this House.

In the case stated the Commissioners found in detail the facts summarized above and in addition they found the following facts relating to the advances in question : (Para. 6). " The sole relations between the appellants and the company were those of solicitor and client, in the course of which they also became creditors for the advances above mentioned." (Para. 7.) " The appellants are in the habit of making advances to clients when required without security." Six examples are then given of advances to other clients made " within recent years," one of them being on security " partly over heritage and partly over reversion " and another (by far the largest) being " to enable a landowner to purchase sheep." It is further stated as follows : " Some of these advances were made to commercial firms for whom the appellants act and they have made advances to clients other than X. Ld. in circumstances and for purposes similar to the said advances of 2615*l.*" It is stated that in answer to a question by the Commissioners the inspector of taxes stated that he did not desire any further inquiry as to the firm's practice in regard to advances to clients or as to the nature and circumstances of the advances to other clients.

It will be observed that there is no finding by the Commissioners that the appellants carried on the business of money-lending in connection with or as a branch of their business as solicitors, nor is it stated that there is any general practice amongst solicitors in Edinburgh so to do. The absence of the latter statement distinguishes this case from *Reid's Brewery Co.* v. *Male* (1), one of the cases relied on by the appellants.

It is not suggested that any part of the advances making up the 2615*l.* consisted of disbursements made in the course of the legal business transacted by the appellants for the company, and nothing that I say must be treated as throwing any doubt on the right of solicitors to a deduction in respect

(1) [1891] 2 Q. B. 1.

of such disbursements not recovered from the client on whose behalf they were made.

In my opinion the advances in the present case come within r. 3 (*a*) of the Rules applicable to Cases I. and II. under Sch. D—namely: "In computing the amount of the profits and gains to be charged no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purpose of the trade, profession, employment, or vocation."

The profession in respect of which the balance of profits and gains were to be assessed was that of writers to the signet. The finding of the Commissioners merely amounts to this, that these gentlemen had from time to time been willing under circumstances of which no particulars are given to oblige clients in need of money by making temporary advances. No doubt in so doing they were probably actuated by the feeling that it was good policy to keep on good terms with their clients and that to refuse to make advances of money might entail a loss of business, but I cannot think that on these findings there is any ground shown for holding that the advances in question were made for the purposes of the appellants' profession of writers to the signet. I cannot hold that the business of money-lending was so far part of the profession of these gentlemen, as carried on by them, as to be one of the purposes thereof, and I should much regret on grounds of public interest if I were compelled so to hold.

I base my judgment on r. 3 (*a*). I feel some doubt whether the loss in question could be said to be not connected with or arising out of the profession 3 (*a*) and, with all respect to the judges of the Court of Session who thought otherwise, I cannot find sufficient material in the facts found by the Commissioners for holding that the advances represented capital withdrawn from the profession.

But if the sum claimed to be deducted comes under any one of the heads comprised in r. 3 the deduction cannot be made.

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For the reasons above stated I think the appeal fails and should be dismissed with costs.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, March 18, 1929.

Agents for the appellants: *Beveridge & Co., for Hagart & Burn-Murdoch, W.S., Edinburgh.*

Agent for the respondents: *Solicitor of Inland Revenue for England, for Solicitor of Inland Revenue for Scotland.*

[HOUSE OF LORDS.]

H. L. (E.)* 1929 *March* 4.

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

LUNCHEON AND SPORTS CLUB, LIMITED . . . . . RESPONDENTS.

Revenue—Betting Duty—Gaming and Wagering—Bookmaker—Bet—Totalisator—Horse Races—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *ss.* 15, 18.

By the Finance Act, 1926, s. 15, betting duty is imposed on every bet made with a bookmaker, and the duty is payable by the bookmaker with whom the bet is made.

A limited company was the proprietor of a club formed for social intercourse. Upon the club premises betting on horse races was transacted through the instrumentality of two machines, called totalisators, owned by the company and worked by the company's servants. Any member desiring to use these machines for the purpose of backing horses applied to join the club pool and, if elected as a pool member, he became entitled on payment of a small subscription to operate, and for this purpose he was supplied with credit vouchers of varying amounts. Under the rules of the pool, 10 per cent. of the gross amount of the stakes on each race was retained by the company in respect of the

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

facilities provided and the expenses of management, and the balance was divided among the backers, called in the rules "investors," of the winning horse in the proportion of their stakes. The winnings for each week were paid by the company from its own funds irrespective of any possible loss owing to dishonour of the vouchers. The rules provided that the club acted simply as a distributing agent.

Upon an information preferred by the Attorney-General against the company, alleging that the company was liable to pay betting duty in respect of wagers on horse races made by members of the club by means of these machines, it was admitted that the company was a bookmaker and that the transactions in question were bets within the meaning of the Finance Act, 1926 :—

Held, that the bets were not made with the company, but by the members inter se, and that the claim of the Crown failed.

Decision of the Court of Appeal [1929] 1 K. B. 233 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing by a majority (Greer and Russell L.JJ.; Lord Hanworth M.R. dissenting) a judgment of Rowlatt J. in favour of the Crown.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of Lord Buckmaster, and they are summarized in the headnote.

1929. Feb. 15. *Sir Thomas Inskip A.-G.* (with him *Bowstead*) for the Crown. It is not now disputed that the company is a bookmaker or that the transactions entered into by the pool members are bets within the meaning of the Finance Act, 1926. The only question is whether these bets are made with the company. It is submitted that they are for the following reasons. Under the rules of the pool the company pays the winnings out of its own funds and receives the losses for its own use; the winners look to the company direct for payment of their winnings and do not look to the losing members of the pool; the company, in its accounts, treats the losers as debtors in respect of their losses and the winners as creditors in respect of their winnings; it has entire control of the business of the pool; it decides what credit shall be granted to the pool members; the credit is granted by the company, and the company takes the risk of bad

(1) [1929] 1 K. B. 233.

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debts. The effect of the rules is that each transaction by a member of the pool is a bet with the management.

Roland Oliver K.C. (with him *G. D. Roberts*) for the respondents was stopped.

Sir Thomas Inskip A.-G. added nothing in reply.

The House took time for consideration.

March 4. LORD BUCKMASTER. My Lords, by s. 15 of the Finance Act of 1926 it was declared that on and after November 1, 1926, there should be levied and paid "on every bet made with a bookmaker a duty" at the rate therein mentioned. The appellant on this appeal is the Attorney-General, acting on behalf of the Crown, by whom it is alleged that a series of transactions effected with the respondents constitute bets made with a bookmaker and that upon such bets they are consequently liable to duty. The amount of the duty is not material.

By s. 18 of the statute a bet is defined as meaning "a bet on an event of any kind"; as an explanatory definition it cannot be said that this phrase throws much light on the question of what is a bet and it affords no help in this appeal. The definition of a bookmaker need not be considered, as it is admitted that the respondents are within its terms. I turn, therefore, to consider who the respondents are and what it is they do.

They are a limited company with registered offices at 35 High Holborn, and are the proprietors of a club known as the Stadium Club, whose premises are at the same address. Upon the club premises gambling transactions are carried on through the instrumentality of two machines, called totalisators, owned by the respondents and in charge of one of their servants. The use of these machines is limited to membership of the club and that membership is regulated by rules, and secured through election by the club committee, but such election must be approved by the respondents.

The club provides for the use of members who join what is called a club pool, a machine introduced to their notice

under the following terms, which do not suffer from undue self-depreciation :—

"1926.

"THE STADIUM CLUB ELECTRIC POOL MACHINE.

"REMEMBER.

"The only one in Europe, is the last word in the development of Pool or co-operative system, and it has been left to the initiative and enterprise of the Stadium Club to provide one for its Pool Members."

If a member of the club wishes to join the club pool he can do so, if his application for that purpose be accepted, by payment of a subscription of 10*s.* 6*d.* and he then becomes entitled "to operate." For this purpose he is provided with vouchers of the following values: 10*s.*, 1*l.*, 2*l.* and 5*l.* He "operates" in the following manner. In anticipation of a horse race he hands in to the clerk in charge of the machine a credit voucher numbered and dated, on which is placed the name of a horse with a space containing the words "Win or Place," the irrelevant word to be struck out or, if not struck out, the "investment" is taken to be on "win." Thereupon the clerk in charge of the instrument makes the consequent alteration and the machine duly records the amount "invested" on each horse, so that each investor can estimate what he will be likely to receive if his investment is successful by the following calculation: After 10 per cent. of the gross amount shown on the vouchers has been retained by the company "in respect of the facilities provided" and expenses of management, the balance is divided among the investors on the winning horse in the proportion of their respective stakes.

The winnings for each week are paid by the respondents from their own funds on every Saturday irrespective of any possible loss owing to dishonour of the vouchers. The respondents thus take the risk of bad debts but, owing to their control of membership, this is probably not serious, $2\frac{1}{2}$ per cent. of the 10 per cent. being regarded by the respondents as sufficient security against such a contingency. Apart from this

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possible loss, the respondents can lose nothing on any race nor, apart from their 10 per cent., which is immutable, can they ever gain.

This then is the respondents' position in relation to the members of the pool :—

They receive the vouchers ; they manipulate the machine ; they collect the money which the vouchers represent ; they distribute the moneys represented by the vouchers received ; they guarantee the honesty of the members, and they take a percentage for their pains.

Turning now to the rules of the pool. Rule 2 provides that " the club acts simply as a distributing agent." The club is, of course, the Stadium Club owned by the respondents. The rules relating to accounts provide for payment of moneys owed or lost to " Winning Pool Members." In one of these rules, rule 3, there is indeed a provision that any member " indebted to the Club or Pool " for fourteen days shall be posted and the privileges of the club withdrawn, but there is nothing in this or elsewhere to show that the indebtedness to the club is anything except the indebtedness in respect of the vouchers, and for this a debt might well arise if the club paid the amount over in accordance with the rules, as the request by the owner of the dishonoured voucher to make such payment seems reasonably plain.

Finally, rules 23 and 24 provide this : " 23. Each Member agrees with the other to pay to the Club an amount equal to 10 per cent. of his stake in respect of the facilities provided, the superintendence and general running expenses of the Pool which amount shall be deducted from the gross amount of the stakes upon each race, and subject thereto the whole amount subscribed to each Pool is divided among the Members as follows :—

" 24. The total WIN POOL, after deduction of the expenses as aforesaid and stake money, will be divided by the number of investments on the Winner."

The relevant matters have now been stated and it remains to see how far they constitute a " bet " between each member using the machinery of the pool and the respondents. This

matter can best be considered in the light of contract. The making of a bet is none the less the making of a contract, because it is by statute unenforceable and void. With whom then are these contracts made? The rules say they are made with the other members, and though, if that were a manifest cloak for the true transaction, no Court would be misled by mere colourable words but would seek the true bargain underneath, yet here I cannot see that the statement is at variance with the facts. The only place where the rules appear to me to part from strict and plain statement of fact is where they describe a common gambling transaction as an investment. What is the contract each member makes with the respondents? It is nothing but this: in consideration of your providing me with the use of the machine, placing at my disposal the clerical assistance, undertaking to pay me if I win the money other members have promised me to pay and guaranteeing the amount, you shall have 10 per cent. of my stake.

In this I can see no trace of gaming or wagering with the respondents. To them the rise and fall of odds, the success or failure of a horse and all the hopes and hazards of the turf are completely immaterial. They can never lose except to the extent of discredited vouchers, and loss due to that act of dishonesty is itself independent of the race. Rowlatt J. and the Master of the Rolls, who alone decided in favour of the appellant, base their judgment on the view that the club are principals, but, even if this view were right, it does not follow they are principals in making bets. A bet is something staked to be lost or won on the result of a doubtful issue, but no doubtful issue affects the respondents—they neither win nor lose on any such chance. Nor does it seem to me that the test applied by both these learned judges "that the winners look to the club and the club to the losers" is a critical test of whether or no they made a bet.

To guarantee the honesty of a gambler, though it may be taking a risk, is not making a bet.

I cannot find that there is anything to throw doubt on the accuracy of the statement that the respondents were

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distributing agents who guaranteed the honesty of all the people who used the machine and took 10 per cent. for their trouble and risk. For this reason I think this appeal should fail.

My Lord Sumner desires me to say that he agrees with the opinion that I have delivered.

VISCOUNT DUNEDIN (read by LORD BUCKMASTER). My Lords, the essence of a bet is that on the determination of an event in one way the first party wins and the second loses; on the determination the other way the first party loses and the second party wins. To induce liability under the statute there must be a bet with a bookmaker. The only bookmaker alleged is the club. Inasmuch as on the determination of the event in question—to wit, whether a certain horse is first or is placed in a race, as the case may be—the club can neither win nor lose, it follows that there is no bet with the only bookmaker alleged. The case for the Crown's claim therefore fails. Quod erat demonstrandum.

LORD BLANESBURGH (read by LORD WARRINGTON OF CLYFFE). My Lords, the learned Attorney-General in opening this appeal relied mainly on the view which prevailed with Rowlatt J. that under the Pool Members' By-laws of this club there is effected on each race a series of bets between each participant and the "Management," represented here by the respondents and to whom I will refer as the club, under an arrangement by which the club receives and retains the stake of each participant who has failed to name, and itself provides according to the measure prescribed by the by-laws the winnings for each participant who has succeeded in naming, a horse either as the winner of a race or for a place in it. The Attorney-General, in this respect following the learned judge, contended that this was none the less the true view of the arrangement, because the by-laws contemplated that so far as the club was concerned the book on each race exactly balanced. Later in his argument, however, the Attorney-General advanced upon that position, and suggested that on a true view of the

by-laws the club was in certain cases entitled to retain as winnings and for its own purposes all the stakes of participant members. As an example he suggested that such would be its right, where no participant member had succeeded in naming a horse that had even been placed in the race.

My Lords, the answer in my view to these contentions is that they are neither of them admissible on a fair construction of the by-laws.

These by-laws are not, as it seems to me, even evidence of a contract between each individual participant in a pool on the one side and the club on the other. They constitute rather a contract between the investing pool members on any race inter se, with a further contract between all these members collectively on the one hand with the "management" or club on the other, whereby the club having provided facilities for its pool members to participate in pools constituted under the by-laws undertakes, for a consideration, the receipt of the subscriptions and the disposal of their net proceeds according to the event and in accordance with the rights and liabilities of the participants as thereby fixed. I can see in these by-laws no room for the making of a bet between any pool member and the club. I am doubtful indeed whether they connote the making of any bets at all either between pool members individually or between losing pool members on the one hand and winning pool members on the other. Rather do I view each pool as being something in the nature of a highly developed sweepstake offering results which, it is true, become practically possible only through the fool-proof accuracy of the totalisator, but which, theoretically, would be equally attainable with the assistance of a calculating boy of requisite genius and character. Be that as it may, however, of one thing I feel satisfied and that is that on a sound construction of the by-laws it is impossible for the club to have in any pool a pecuniary interest the extent of which is ever measured by the result of any race. The fixed fee of 10 per cent. of the takings allowed to the administration for its services and the retention by it of the "fractions," which are never in any way dependent on the event, represent

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the sole interest of the club in any pool: and its practice in paying over winnings without necessarily having received the subscriptions of all the losing participants is, it seems to me, no more than one of the services rendered by the club in consideration of that fee.

In the result, agreeing entirely as I do with the definition of a bet given by Viscount Dunedin, I am of the opinion with him that the case of the Crown here fails.

LORD WARRINGTON OF CLYFFE. My Lords, for myself I have only to say that I agree with the opinions of my noble and learned friends Lord Buckmaster and Lord Dunedin.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 4, 1929.

Solicitor for the appellant: *Solicitor for Customs and Excise.*
Solicitors for the respondents: *De Buriatte & Bowen.*

[HOUSE OF LORDS.]

SHOTTS IRON COMPANY, LIMITED . APPELLANTS;

AND

CURRAN AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.)*
1929
Feb. 15.

Workmen's Compensation—Dependants—Children's Allowance—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 8, *sub-s.* 1.

The Workmen's Compensation Act, 1925, s. 8, sub-s. 1, provides that the compensation under the Act, where death results from the injury, shall be a lump sum "together with, if the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, an additional sum (hereinafter referred to as the children's allowance)":—

Held (by Lord Hailsham L.C., Viscount Dunedin, Lord Shaw of Dunfermline and Lord Buckmaster; Lord Carson dissenting), that the children's allowance is not limited to the children of the deceased workman, but is payable in respect of any members of the deceased workman's family who at the date of his death were under the age of fifteen and were wholly or partially dependent upon his earnings:—

Where therefore a workman who had been killed by an accident arising out of and in the course of his employment left his mother and several brothers and sisters under the age of fifteen partially dependent on his earnings.

Held (by the same majority) that the brothers and sisters were entitled to the children's allowance.

Pritchard v. *Bettisfield Colliery* [1925] 2 K. B. 284 and *Campbell* v. *Portland Colliery Co.* 1926 S. C. 512 followed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland upon a case stated by the Sheriff-Substitute of Lanarkshire in an arbitration under the Workmen's Compensation Act, 1925.

The only question in dispute in this arbitration was as to the assessment of the compensation payable under s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925, to the dependants of one Thomas Curran, who was killed by an accident arising out of and in the course of his employment with the appellants. The arbitrator found that the deceased

* *Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD BUCKMASTER, and LORD CARSON.

H. L. (Sc.) 1929 SHOTTS IRON CO. v. CURRAN.

left the respondents, his mother and eight brothers and sisters under the age of fifteen years, partially dependent on his earnings, and he assessed the compensation payable by the appellants at 210*l.*, and the children's allowance at 250*l.*, and awarded the cumulative amount of 460*l.* compensation to the respondents.

The question of law for the opinion of the Court was whether the arbitrator could competently hold that the brothers and sisters of the deceased were entitled to an additional sum as "children's allowance" under s. 8, sub-s. 1, of the Act of 1925.

The First Division, on the authority of *Campbell* v. *Portland Colliery Co.* (1)—a former decision of the same Court under the corresponding section of the Workmen's Compensation Act, 1923—answered this question in the affirmative.

1928. Nov. 22. *Normand K.C.* (of the Scottish Bar) (with him *J. O. Taylor* and *Albert Russell* (both of the Scottish Bar)) for the appellants. The question is whether the children's allowance provided for by s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925, is payable in respect of all dependants of the deceased workman who may be under fifteen years of age at his death or is payable only in respect of sons and daughters of the deceased workman under that age. The additional compensation, called by the Act of 1925 the children's allowance, was first introduced by the Workmen's Compensation Act, 1923. Under the Act of 1906 compensation in fatal cases was awarded without distinction as to age to dependants within various degrees of relationship, with the result that the total award was frequently dissipated in so many directions that the workman's own children were left with no adequate means of subsistence until the age when they might be expected to earn their own living. Accordingly, the principle was adopted of making a supplementary provision for the children of the workman under fifteen years of age in cases where the workman also left other dependants. In cases where the deceased workman left no dependants

(1) 1926 S. C. 512.

except children under fifteen no such provision was necessary, because the children would get the whole of the compensation.

Sect. 2 of the Act of 1923, the marginal note to which is "Increase of amount payable on death of workman leaving children", provides for the payment of an additional sum "where the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent," and in s. 24, sub-s. 2, of that Act this additional sum is described as "the additional sum payable in respect of the children of the deceased workman." The Legislature has therefore supplied a definition of the word "children" as used in s. 2.

The Workmen's Compensation Act, 1925, is purely a consolidating Act, and it did not purport, by changing the name of the additional allowance enacted by the Act of 1923, to change its character; the children's allowance remains what it was before—a sum payable in respect of the children of the deceased workman. In construing s. 2 of the Act of 1923 and the corresponding provision in the Act of 1925 regard should be had to the purpose for which the children's allowance was instituted. It is not permissible to refer to the proceedings in Parliament to explain the meaning of a statute; but recourse may be had to any outside source to show what was the mischief sought to be remedied by the statute in question: *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade-marks.* (1)

The Report of the Departmental Committee of 1920 on Workmen's Compensation (the Holman Gregory Committee) may therefore be looked at for that purpose. That report shows that the committee considered the pressing need to be that adequate provision should be made to secure that the children of a fatally injured workman should have a reasonable chance of developing into healthy and useful citizens, and, in order to make the most adequate provision possible for the young children of the workman, the committee

(1) [1898] A. C. 571, 573-6.

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recommended the separate treatment of different classes of dependants. The Act of 1923 did not carry out the recommendations of the committee in the form in which they were made, but, in the appellants' submission, it has preserved the principle of separate treatment of the workman's own children under fifteen where there are other dependants. The Act of 1923 had two objects. Its first object was to make a permanent increase in the amount of compensation to meet the change in the value of money due to the war, and its second object was to prevent the dissipation of the compensation awarded in the case of death to the prejudice of the deceased workman's children. The appellants' construction alone fulfils that purpose and satisfies the rule that in construing an Act of Parliament effect must be given to every word and that the words of the Act must receive their ordinary meaning. The respondents' construction gives no meaning to the words "child" and "children" in s. 8, sub-s. 1, and renders them superfluous. The ordinary popular meaning of the word "child," when used in relation to a particular individual, is that person's son or daughter, and when the sub-section speaks of the deceased workman leaving children that can only refer to his own children. "Children" in every other place in the Act is used with reference to the father and it should be used in the same sense in this sub-section. It follows that *Pritchard* v. *Bettisfield Colliery* (1); *Campbell* v. *Portland Colliery Co.* (2); and *Faulkner* v. *Owners of Ship Sutton* (3) were wrongly decided. *Scott* v. *London and North Eastern Ry. Co.* (4) has no materiality.

G. Morton K.C. (of the Scottish Bar) (with him *T. Scanlan* (of the English Bar) and *R. Gibson* (of the Scottish Bar)) for the respondents. The words "child" and "children" as used in s. 8, sub-s. 1, have no reference to parental relationship but refer to young persons who are members of the workman's family, as defined by s. 4, sub-s. 3. That is the natural construction and it is the construction which

(1) [1925] 2 K. B. 284.
(2) 1926 S. C. 512.
(3) [1927] 1 K. B. 207.
(4) (1926) 2 K. B. 204.

has been approved by the authorities. *Pritchard's* case (1), which was decided under the Act of 1923, must have been present to the mind of the Legislature when the Act of 1925 was passed, and the Legislature must be presumed to have accepted the law there laid down. That decision has since been followed in *Faulkner's* case. (2)

Normand K.C. replied.

The House took time for consideration.

1929. Feb. 15. LORD HAILSHAM L.C. My Lords, this appeal raises a narrow point of construction under the Workmen's Compensation Act, 1925.

The deceased workman, Thomas Curran, admittedly met his death from an accident arising out of and in the course of his employment with the appellant company in such circumstances as to give rise to a claim by his dependants for compensation. It was found in the arbitration that his mother and his eight brothers and sisters were all partially dependent upon him; and that these brothers and sisters at the date of his death were all under fifteen years of age. The arbitrator awarded compensation of 210*l.* plus a children's allowance of 250*l.*, and stated for the opinion of the Court a question of law whether in assessing the compensation he could competently hold that the brothers and sisters of the deceased workman were entitled to an additional sum as children's allowance under the Act.

Sect. 8, sub-s. 1, of the Workmen's Compensation Act, 1925, confers the right to children's allowance in these terms: "The compensation under this Act where death results from the injury shall be a lump sum of an amount calculated in accordance with the rules hereinafter contained, together with, if the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, an additional sum (hereinafter referred to as

(1) [1925] 2 K. B. 284. (2) [1927] 1 K. B. 207.

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the children's allowance) of an amount calculated in accordance with the rules hereinafter contained, so, however, that the lump sum and children's allowance (which shall be added together and dealt with as a single sum) shall not in any case exceed in the aggregate six hundred pounds."

" Member of a family " is defined in s. 4, sub-s. 3, to mean " wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister."

It is admitted that the brothers and sisters were members of the deceased workman's family, and that they were children under the age of fifteen, and that they were partially dependent upon him; but the appellants argued that the expression " leaves one or more children " means in natural parlance children of the deceased; and it was said that the corresponding expression " not being a child under the age of fifteen " meant not being a child of the workman under that age. The appellants pointed out that any other construction renders the words " a child " unnecessary, and they contended that the intention of the Act of Parliament was to confer a special benefit upon the infant sons or daughters of a man who was accidentally killed.

My Lords, I am unable to accept this argument. I agree that the words " a child " are unnecessary if the appellants' construction be not accepted; but I think that a sufficient reason for the use of the words may be found in the fact that the expression " a child under a given age " is a common phrase; and I think further that if the appellants were correct the natural phrase to use would be " not being one of his children." Further, while I accept the contention that in ordinary parlance when a man is said to " leave children " this means sons or daughters of his own, I do not think that this is the necessary or indeed the natural meaning of the expression in the context in which it is used. In the earlier part of the sub-section the workman is described as " leaving a widow or other member of his family "; from that family

are excluded children not under the age of fifteen, and I think that when the section goes on to speak of his leaving "children under the age of fifteen" it refers to those members of the family who are excluded in the earlier part of the section. Nor do I think that there is any ground for assuming that the intention of the Legislature was to benefit the sons and daughters of the deceased workman. As I read the statute as a whole, the intention was to confer upon persons who were being supported wholly or in part by the deceased workman some sum of money to compensate them for the support of which they were deprived. The Legislature seems to have considered that if some of these dependants were above the age of fifteen and others below that age, the sum of compensation would be so widely distributed as to afford an insufficient provision for those children who, by reason of their age, were incapable of contributing to their own support, and therefore a special extra provision is made for that class. Since the test to the right to compensation is made to rest upon the fact of dependency and not upon the legal right to support, I see no reason for assuming that the special provision is to be limited to the children of the deceased.

Great stress was laid in argument upon the wording of s. 24, sub-s. 2, of the Act of 1923, which was one of the Acts consolidated in the Act of 1925. By that sub-section it is provided that certain deductions were not to be made "so as to reduce the sum payable in respect of children of the workman under the said section 2," the said s. 2 being that reproduced in s. 8 of the 1925 Act. But when we turn to the corresponding provision of the 1925 Act, s. 8, sub-s. 3 (iii.), we find that the language is changed, the expression "sum payable in respect of children of the workman" disappears and is replaced by the phrase "children's allowance." The argument was that the language of s. 24, sub-s. 2, of the 1923 Act shows that the allowance given by s. 2 of that Act (s. 8 of the present Act) was an allowance in respect of children of the workman, i.e., in respect of his own sons and daughters, and that as the 1925 Act was a consolidation Act the same meaning must be placed upon s. 8.

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But, my Lords, I think that any difficulty which might have been created by this argument is removed by a consideration of the cases decided under the 1923 Act. It appears that in May, 1925, the Court of Appeal in England had decided a case, *Pritchard* v. *Bettisfield Colliery* (1), in which they had expressed the view that the children's allowance extended to all dependants who were children and was not confined to children of the deceased workman. When the consolidation Act of 1925 was passed in December of that year that was the state of the law as declared by the Courts; and in my view the natural inference to be drawn from the change of language in s. 8, sub-s. 3 (iii.), is that the Legislature wanted to make it quite clear that they were only re-enacting the law as laid down in the Courts, and to avoid any possible difficulty arising from the wording of s. 24, sub-s. 2. In this view the change of language rather fortifies than impairs the construction which I have placed upon the statute. The same decision as to the meaning of the section in the 1923 Act has been reached in Scotland in *Campbell* v. *Portland Colliery Co.* (2), and has been followed in England in the case of *Faulkner* v. *Owners of Ship Sutton.* (3) Whether or not the Court of Appeal were right in *Pritchard's* case (1) in so construing the language as to include illegitimate children it is not necessary to consider, and I express no opinion upon the point; but in my judgment the section does include any members of the deceased workman's family who are children under the age of fifteen and who are wholly or partially dependent upon his earnings. It follows that the decision appealed from must be affirmed and this appeal dismissed with costs. I move your Lordships accordingly.

VISCOUNT DUNEDIN. My Lords, I concur. I think it necessary first of all firmly to grasp the fact that the scheme of the Act entirely gives the go-by to notions of legal liability. The compensation to be paid on the death of a workman caused by injury arising in the course of and out of his employment is not to be paid to those whom he was at law while

(1) [1925] 2 K. B. 284. (2) 1926 S. C. 512.
(3) [1927] 1 K. B. 207.

alive bound to support but is to be paid—s. 2, sub-s. 1, of the Act of 1925—" to or for the benefit of his dependants as provided by this Act." Dependants entitled to compensation are defined, s. 4, sub-s. 1, as, in cases of injury resulting in death, " such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death," with the addition of certain provisions as to illegitimate children which are not in point in this case. " Member of a family " is defined by s. 4, sub-s. 3, as meaning " wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister." I now come to the section on the interpretation of which this case depends—s. 8, sub-s. 1. The section has been quoted and I need not quote it again. The compensation is to be a lump sum. This goes to the whole members of the family. Then come the words to be construed. " Together with "—i.e. what is coming is in addition to the previous lump sum. But the addition is conditional, it is only to be given if the workman leaves a widow or other member of the family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, this additional sum to be calculated in a certain way. Now I ask myself first what is the idea of making the additional sum conditional on there being no member of the family left who is not a child under fifteen whatever that means. The Lord President in the former case expressed himself as puzzled by this. I think it is clear. If children under fifteen (leaving over for the moment the true meaning of the word " children ") are the only members of the family who are left, the whole of the first lump sum goes to them under the former part of the clause. But if there are others who under the first part are to be co-sharers then as the children are young and will not be able to earn for themselves for some time it was expedient that there should be something extra given to tide over the time till they reached the earning age.

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I now revert to the clause "If the workman leaves a widow or other member of his family." It is clear I think that "leaves" must only mean "leaves behind." It is true that if you speak of a man's "leaving" a widow or a child, you mean his own widow or his own child. But no one speaks of "leaving" a stepfather or a stepmother. So that when "leaving" is applied indiscriminately to the congeries of persons defined as members of the family I think it obviously means leaving behind. Then from the members of the family so left there is an exception made "not being a child under the age of fifteen." "A child under fifteen" is a familiar expression in the sense of any child. Here again if I am right as to the ratio of the whole provision why should there be any distinction between a child of his own (being a member of the family) and any other child being also a member of the family? I come therefore to the conclusion—I confess without difficulty—that the mere fact that the word "child" may be said to be pleonastic does not alter what to me is the obvious meaning of the expression, that the exclusion is to be of such members of the family as are children, i.e. young persons, under the age of fifteen, not merely the workman's school children under the age of fifteen.

If that be so then we come to the latter part of the clause "and in addition leaves one or more children so dependent." I think it is obvious that the plural here must be taken in the same sense as the singular has just been used above.

This answers the question put. "Children" means such members of the family as are under fifteen and are so dependent. It seems to me quite consonant with this that when for other purposes, by a question of deduction, this allowance is mentioned, s. 8, sub-s. 3 (ii.), the payment is designated as "children's allowance," an absolutely general term.

I therefore agree in the motion made.

LORD SHAW OF DUNFERMLINE (read by LORD BLANESBURGH). My Lords, I agree in the judgment and opinion of my noble and learned friend on the Woolsack.

The House is engaged upon the construction of s. 8, sub-s. 1, of the Workmen's Compensation Act of 1925, which has been read.

In the argument presented to the House much stress was however laid upon the wording of s. 24, sub-s. 2, of the Act of 1923, in which a provision was made that certain deductions were not to be allowed so as to reduce the sum payable in respect of the "children of the workmen." This limitation of the word "children," it was argued, should be extended to the word "children" as used in all other parts of the Act, and it was further suggested that the Act of 1925, which was no doubt a consolidating Act, should be read in the same limited sense.

I cannot agree. These words are not repeated in the 1925 Act. Another phrase—namely, "children's allowance"—is used, that is to say, without the limitation to the children of the workman. The earlier Act had, by various cases decided by the Courts, not been interpreted in the limited sense argued for. Although the Act of 1925 is a consolidation statute I can give no countenance to the idea that underlay the appellants' argument that the Legislature, in passing any such legislation, is performing an act merely of literal consolidation. It need not be blind to what has gone on in the interpretation by Courts of law of the Acts which it consolidates: the clarifying of expression, and the removal of doubts are frequently and most naturally and properly the accompaniment of consolidation.

The true attitude of an interpreter is explained by Lord Herschell in *Bank of England* v. *Vagliano* (1) in the following sentences: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute,

(1) [1891] A. C. 107, 144.

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intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated."

Upon the main point of the case which is as stated in the question of law put by the Sheriff-Substitute, I agree in thinking that the brothers and sisters of the deceased Thomas Curran were entitled to an additional sum as "children's allowance" under s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925. I do not repeat the sub-section: but observe (1.) that the circumstances of the family of the deceased seem quite exactly to fit the conditions and definitions of the statute. This was a family consisting of father and mother with nine children. One of these children was the deceased miner who lost his life in the accident. All the others, eight in number, his brothers and sisters were under fifteen years of age. His earnings had gone partly in support of them and they are accordingly within the definition of dependants under s. 4, sub-s. 1, of the statute if they were "members of the workman's family." (2.) That they were included within the number of such members is made clear by the definition contained in s. 13 of the Act of 1906 which has been carried forward and applies to this case. "Member of a family" expressly includes "mother" "son, daughter" "brother, sister."

It is clear accordingly by s. 8, sub-s. 1, that if the workman leaves a member of his family not being a child under fifteen wholly or partially dependent (his mother is such a member) and in addition leaves also dependent on his earnings one or more children under fifteen, then the additional "children's allowance" seems to fall due and every condition of the statute has been completely satisfied. These children were dependent because they had been partially supported by the deceased's earnings and because they were members of his family under the statute, being his brothers and sisters. The learned arbitrator has proceeded correctly on this footing, and there is no question raised as to the amount awarded if it be the case that a children's allowance is due. I fail

to understand why this House should be asked to limit the children's allowance to the issue of the body of the deceased. There is no such limitation in this statute, and the very perusal of the definition of not only the expressions "dependent" but "members of a family," would point to such a restriction of the benefits as being contrary to the meaning and intent of the statute.

This was the view taken by the Court of Appeal in *Pritchard* (1) and *Faulkner*. (2) I refer particularly to the judgment of Scrutton L.J. in *Faulkner's* case, in which he said: "It seems to me the correct view is to read the word 'child' as meaning, not his child by parentage, but a child or young person under fifteen in both parts of the section." I think these decisions and also the decision appealed from were right.

In my opinion this appeal should be refused.

LORD BUCKMASTER. My Lords, I agree and I have nothing to add.

LORD CARSON. My Lords, I have arrived at a different conclusion and think that this appeal should be allowed.

It is necessary first to consider the Act of 1923. Prior to that Act there was no children's allowance apart from compensation, which was awarded as a lump sum without distinction as to age to dependants within various relationships, as defined by statute. The Act of 1923, whilst it repealed the Workmen's Compensation (War Addition) Acts of 1917 and 1919, which provided for certain temporary increases, made a permanent increase in the amount of compensation payable in respect of dependency and, in addition, introduced for the first time an additional sum referred to in the Act of 1925 as the "children's allowance" under the conditions mentioned in s. 2 of the Act of 1923. The reason for this method of compensation instead of merely increasing the lump sum is in my opinion apparent. Having regard to the number of

(1) [1925] 2 K. B. 284. (2) [1927] 1 K. B. 207, 212.

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persons included in the definition of "members of family" the total award would be in many cases so dissipated by distribution as to leave the workman's children under the age of fifteen years with inadequate provision for their maintenance until they arrived at an age at which they might be able to help themselves. Now s. 2 states as follows: "Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or mainly dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent, then—" the additional provision for such children arises.

The same Act also provides by s. 24, sub-s. 2: "No deduction shall be made under paragraph (1.) (*a*) (i.) of the First Schedule to the principal Act, as amended by section two of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section below two hundred pounds."

My Lords, taking s. 2 alone I can find no reason for construing the word "child" otherwise than in its ordinary sense when taken in connection with legislation which has for its object workmen's compensation, i.e. the workman's child. It is to be noticed that in the definition of "member of a family" the word "child" does not occur and that the words son and daughter are used—and "child" seems to me to be an appropriate inclusive word for both. It is said (and your Lordships who have preceded me are of opinion rightly said) that the word "child" means any dependent member of the family under the age of fifteen. My Lords, with great respect, if that is so, I cannot understand why the word "child" is introduced at all or what effect is given to it, as the same result would have been attained by leaving it out and making the section read "not being under the age of fifteen" and so in the remaining part of the section the word "children" could be altogether omitted. I think this even more apparent when you consider (*a*) and (*b*) of s. 2 and contrast the terms "member of the workman's family" and "child or children." But, my Lords, however that may

be, the question seems to be settled by a reference to s. 24, sub-s. 2, already quoted. There the words used in dealing with the same subject-matter and indeed as part of the scheme are " the children of the workman "—and it is not contended that the section, as regards the deductions in it, means that members of the family under fifteen are to receive any different treatment as regards reduction than the children of the workman, assuming the construction of s. 2 of the Act of 1923 is as contended for by the respondents.

My Lords, it is to be noted that none of the authorities cited before us—all of which were in cases to which the Act of 1923 applied—even mention this important section.

But, my Lords, it is said that in the Act of 1925, which is applicable to the present case, the term " children of the workman " is no longer used and that, therefore, having regard to the change of language, the Act of 1925, which is a consolidation Act, meant to declare the law, as settled by the said decided cases. I shall deal later with the cases, but I can find nothing in the Act of 1925 to lead to this conclusion.

It is quite true that the words I have quoted are omitted, but I think the reason is because in the consolidating Act the additional sum is for convenience sake shortly defined throughout as "the children's allowance": s. 8, sub-s. 1. On the other hand, the only other places where the word " child " or the word " children " appears are in s. 4, sub-s. 1, and s. 22. In the former of these sections it occurs qualified by illegitimate which plainly infers relationship and is conditioned by the words " parent " or " grandparent." In the latter section, which is more important, power is given to a county court judge to vary awards " on account of neglect of children on the part of the widow " and I cannot see how it is possible to construe these words as relating to any but the widow's own children. Indeed, my Lords, the more I examine the Acts in question the more I am inclined to agree with Mr. Normand's contention that wherever " child " or " children " is mentioned it means from the context the workman's own child or children. It is further to be observed that if all dependants under the

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age of fifteen are included the numbers to share would or might perpetuate the very dissipation of compensation which I have suggested it was intended to exclude in favour of the workman's own children. For example, in the present case if the workman had had young children they would have had to share the children's compensation with eight brothers and sisters, who still had their father, who was in a position to maintain them.

My Lords, we have not the advantage of any judgments delivered by the First Division of the Court of Session in Scotland, as they considered the case governed by *Campbell* v. *Portland Colliery Co.* (1), decided in 1926, and which it was alleged was supported by the previous case of *Pritchard* v. *Bettisfield Colliery* (2), which was a judgment of the Court of Appeal. Now it is remarkable that although both these cases were decided under the Act of 1923 there is no mention in the report of the arguments nor in the judgments of s. 24, sub-s. 2, to which I have already called attention, as expressly referring to children as "children of the workman." But, my Lords, apart from this very serious omission, the question in *Pritchard's* case (2) was an entirely different one from that now before this House. The only question that arose was whether an illegitimate grandchild is a "child" within the meaning of s. 2 of the Act of 1923, and although there are expressions of the learned Lords Justices which support the respondents' contention, I cannot myself think that the case is any real authority for the point now under consideration. Nor do I think that the decision in the *Campbell* case (3) gives us much satisfactory guidance. Indeed it is plain that the learned judges who decided the case were very much perplexed and I am not at all sure that the Lord President was not under a misapprehension which led him to the conclusion at which he arrived. He states in the course of his judgment as follows: "Now, I think it is impossible—having in view the wide variety of persons included in the statutory definition of 'members of the family'—to read the

(1) 1926 S. C. 512. (2) [1925] 2 K. B. 284.
(3) 1926 S. C. 512, 517, 518.

word 'child' in this part of the section as being limited to the immediate descendants of the workman. It may be difficult to understand (I confess to finding it so) why the qualification of dependent children *under* fifteen to enjoy the benefit of the increased compensation should be made conditional upon the existence of a dependent member of the deceased workman's family *of* fifteen (or over). But it would be the height of absurdity to hold that condition fulfilled if such dependent member be *not* himself one of a workman's immediate descendants, but to hold it to fail if he *was* himself one of them." The misapprehension which misled his Lordship is I think forcibly and accurately stated in the appellants' case as follows: "In answer to the last sentence of the passage quoted, the appellants respectfully submit that his Lordship is in error, and that the condition (of the existence of a dependent member of the deceased workman's family of fifteen or over) does not fail if such dependent member is an immediate descendant of the workman. It only fails if the workman leaves no dependants except his children under fifteen. The class of dependants referred to in the first part of the section *includes* the workman's children of fifteen or over, and even when there is left only one child of the workman of fifteen or over, but there are children under fifteen, the condition is satisfied. Accordingly, the ground for his Lordship's adverse opinion is in the humble submission of the appellants unsound."

His Lordship's other difficulty is solved when one considers that where there are no other dependants the children under fifteeen do not require a special allowance, because they take the whole of the lump sum. Passing to the judgment of Lord Sands I find him stating as follows: "Finally, if we could regard the case as one—and I came very near to so regarding it—which could be decided either way without any confidence that one is right, I think we may be legitimately influenced by the opinions of the Court of Appeal in the case of *Pritchard*. (1)" The only other case to which reference was made was that of *Faulkner* v. *Owners of Ship*

(1) [1925] 2 K. B. 284.

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Sutton (1), but as the decision merely followed *Pritchard's* case (2) I do not think it gives any further assistance.

I cannot, my Lords, therefore consider the present case as having any satisfactory series of decisions in support of the respondents' contention which deters me from giving expression to a construction of the section which I feel constrained to entertain as the natural one. Nor, my Lords, with great respect to those of your Lordships who take a different view can I agree that in passing the consolidation Act of 1925 the Legislature under these circumstances ought to be presumed to have desired to give effect to the law laid down in these cases which were in my opinion erroneous having regard to the omissions to which I have referred and cannot be held to have settled the law in any satisfactory sense.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 15, 1929.

Solicitors for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W. S., Edinburgh.*

Solicitors for the respondents: *Herbert Z. Deane & Co., for Thomas Scanlan & Co., Glasgow, and John Baird, Edinburgh.*

(1) [1927] 1 K. B. 207. (2) [1925] 2 K. B. 284.

[PRIVY COUNCIL.]

FINCH . . . . . APPELLANT; J. C.*

AND 1929

COMMISSIONER OF STAMP DUTIES . RESPONDENT. Jan. 22.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Death Duties—"Gift"—Expenditure on Improvements to Wife's House—Death Duties Act, 1921 (*No.* 21 *of* 1921, *N.Z.*), *ss.* 38, 39.

A husband and wife, with their children, lived together in a house which belonged to the wife; each enjoyed a separate income. The husband paid to a builder with whom he had made contracts, about 2000*l.* for improvements and repairs to the house. A few months later he died at the age of fifty-three. It was found that the transaction was not entered into with intent to diminish the value of the husband's estate, but that the object was simply to improve the family home in accordance with their means and station in life; and that there was no reason to believe that the husband would not enjoy the normal span of life, or that he would necessarily predecease his wife:—

Held, the payments did not constitute a gift to the wife of the deceased within the provisions of ss. 38, 39 of the Death Duties Act, 1921, of New Zealand, so as to be deemed to be part of the husband's estate for the purposes of that Act.

Judgment of the Court of Appeal of New Zealand [1927] N. Z. L. R. 807 reversed.

APPEAL (No. 40 of 1928) from a judgment of the Court of Appeal of New Zealand (October 18, 1927) reversing a judgment of Skerrett C.J. (September 8, 1927), upon a case stated.

The appeal related to the duties payable under the Death Duties Act (No. 21 of 1921) as amended by the Death Duties Amendment Act (No. 19 of 1923), of New Zealand, in respect of the estate of C. E. Finch, the appellant's husband, who died on June 15, 1926.

The question raised by the case stated was whether the estate of the deceased for the purpose of death duties included a sum of 1982*l.* paid by the deceased to a builder in 1925 and 1926 under contracts made by the deceased for improvements

* *Present:* LORD HAILSHAM L.C., LORD SHAW OF DUMFERMLINE, LORD CARSON, LORD ATKIN, and SIR CHARLES SARGANT.

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and repairs of a house belonging to his wife, in which he was residing with her.

The facts and the material provisions of the Act appear from the judgment of the Judicial Committee.

The Court of Appeal, reversing the judgment of Skerrett C.J., held that the sum in question constituted a gift by the deceased to his wife within s. 38 of the Act, and consequently was by s. 5 to be deemed part of the deceased's estate. The appeal is reported at [1927] N. Z. L. R. 807.

1929. Jan. 22. *Blanco White* for the appellant. *Latter K.C.* and *Cyril King* for the respondent.

The judgment of their Lordships was delivered by

LORD HAILSHAM L.C. In their Lordships' opinion this appeal succeeds. The point is a short one and turns upon the application to the particular facts of this case of two or three sections of the Death Duties Act of 1921. The facts in the case stated are not very fully elaborated partly apparently because the Crown sought to extend and modify the grounds upon which it supported its claim when it reached the argument of the case stated in the Courts, but those facts have been supplemented by agreement between the parties.

It appears that the deceased and his wife, Mrs. Finch, were living together in a house belonging to the wife. Both the husband and wife enjoyed a separate income, and the wife's income was habitually under contribution to the household expenditure. The case finds that in fact the deceased husband's contribution to the joint purse for housekeeping purposes had been kept at a low figure for the purpose of accumulating his capital. In the years 1925 and 1926 the husband caused certain alterations and repairs to be made in the house in which they were both living. The total amount so expended came to 1982*l.* and was spent under contracts made directly between the husband and the builder who did the alterations and the repairs. In those circumstances the Crown claims that the payments so made to the builder were, for the purposes of the Death Duties Act, gifts to the wife.

In order to see whether that contention is well founded, it is necessary to look at one or two sections of the Act in question. Under s. 5 of the Act it is provided that the estate of a deceased person shall be deemed to include any property comprised in any gift within the meaning of Part IV. of the Act made by the deceased within three years before his death. In Part IV., under s. 38, the term "gift" is defined to mean "any disposition of property (as hereinafter defined) which is made otherwise than by will, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth." Sect. 39 provides by sub-s. (*a*) that the term "disposition of property" means "any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity"; and by sub-s. (*f*): "Any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own estate and to increase the value of the estate of any other person." Originally it appears that the Crown based their claim in this case upon sub-s. (*f*), and alleged that the payments to the builder were transactions entered into by the husband with intent thereby to diminish the value of his own estate and to increase the value of his wife's estate. In their Lordships' opinion the facts found by the Commissioner render that contention quite hopeless. It is expressly found that there was no reason to believe that the deceased would not enjoy the normal span of life (he was, in fact, only fifty-three years of age when he died) or that he would necessarily predecease the appellant, and it is added in the supplementary statement of facts that the appellant's estate was as large as that of the deceased. It is further found that the object in the appellant's mind, and, as far as she knew, the object in the deceased's mind was simply the improvement of the family home in accordance with their means and station in life.

In their Lordships' view when the statute brings in as a gift a transaction entered into with intent to diminish the value of one estate and to increase the value of another, what is hit at by the statute is a transaction which the person

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entering into it intends to have the effect stated in the sub-section. It is not enough merely to prove that the result which is stated in that sub-section accrued. The Commissioner here has found that there was no such intention, and, therefore, the claim under sub-s. (*f*) fails. But in the argument before the Chief Justice it was contended alternatively for the Crown that sub-s. (*a*) was applicable, and that these payments to the builder were payments without any adequate consideration in money or money's worth. A reference was made to a decision in New South Wales in the case of *Chadwick* v. *Commissioner for Stamps* (1), where Sir William Cullen says that: "If A knowingly and voluntarily spends his money in building upon B's land with B's knowledge and approval he makes a gift to B as effectually as if he handed him the money for the purpose of building on it himself." That one method of making a gift may be by spending money on the property of the donee is no doubt quite true, but the Chief Justice quite obviously did not intend to convey that every expenditure of that kind must necessarily involve a gift, because he goes on a little later in his judgment to say: "The fact that A himself has a partial interest in the property is not necessarily proof that the expenditure is not a gift, wholly or in part. According to the circumstances of the case the facts may show that the expenditure is referable to other considerations."

On the facts found here it seems to their Lordships quite plain that the payments to the builder were not referable to any intention of making a gift or improving the value of the estate of the wife, but were referable to the desire of the husband to improve the home in which he was living and in which his children were being brought up, and did not constitute, either in intention or in fact, a gift to the wife; they were merely a provision made by him for his own enjoyment and benefit and for the proper maintenance of his home and his children.

For these reasons, which are substantially the reasons set out in the judgment of the Chief Justice of New Zealand

(1) [1927] N. Z. L. R. 39.

with which their Lordships find themselves in full agreement, their Lordships come to the conclusion that the payments are not rightly included in the dutiable estate of the deceased, and they will humbly advise His Majesty that the appeal be allowed and the judgment of the Chief Justice restored with costs here and below.

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Solicitor for appellant: *Harry F. Strouts.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

COMMONWEALTH OF AUSTRALIA . APPELLANT;

AND

STATE OF NEW SOUTH WALES AND ANOTHER . . . . . } RESPONDENTS.

J. C.* 1929 *Jan.* 29.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Crown Lands—Dedication—Revocation of Dedication—Garden Island—Imperial Order in Council—Effect of Recital—Legislative Power of State — Crown Lands Consolidation Act (No. 7 of 1913, N. S. W.), s. 25.

When the New South Wales Constitution Act, 1855, was enacted, Garden Island, in Port Jackson, was part of the waste lands of the Crown, the entire management and control of which were vested by s. 2 of that Act in the legislature of the Colony. By notices published in 1865 and 1866, pursuant to the Crown Lands Alienation Act, 1861 (N. S. W.), the island was dedicated as a naval depot. It continued to be so used by the Imperial naval authorities until 1913, but since that date it had been occupied by the Commonwealth naval authorities for the use of the naval forces which it provided and maintained. An Imperial Order in Council made in 1899 under the Colonial Fortifications Act, 1877, recited an agreement by which the Government of New South Wales were to erect buildings and carry out works (partly on Garden Island), and the Imperial Government agreed that when the buildings and works were completed and the sites "conveyed, granted, or dedicated in perpetuity for the use of Her Majesty's navy in the same way as Garden Island had been" the Imperial Government would

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* *Present:* LORD BUCKMASTER, VISCOUNT SUMNER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD ATKIN.

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surrender certain lands which were not within s. 2 of the Act of 1855; the Order then, in consideration of the agreement, vested the lands in the Government of New South Wales. In 1923 the Minister administering the Crown Lands Consolidation Act, 1913 (N. S. W.), acting under s. 25 of that Act, revoked the dedication of Garden Island:—

Held, that the recital in the Order in Council of 1899 did not preclude the Minister from revoking the dedication in the manner provided by the Act of 1913, and that the revocation was effectual under s. 25 of that Act, although the notice did not state the manner in which it was proposed to deal with the island.

Acting within the constitution, the legislature of a self-governing Colony or State is supreme, and no act of the executive Government can fetter in any legal sense the future exercise of its powers, or give to any person a title other than such as could be conferred under existing legislation.

Judgment of the High Court (38 C. L. R. 74) affirmed, subject to the declaration made, that the respondent State was entitled to possession of Garden Island, being varied to a declaration, in the words of s. 25 of the Crown Lands Consolidation Act, 1913, that by virtue of the revocation the island had become Crown lands within that Act, and liable to be dealt with in accordance therewith.

APPEAL (No. 163 of 1927) by special leave from a judgment of the High Court of Australia (August 18, 1926) whereby it was declared that the State of New South Wales is entitled to possession of Garden Island, in Port Jackson, in that State.

The action was brought in 1924 in the High Court by the respondents, the State of New South Wales and the Attorney-General for that State, against the appellant, the Commonwealth of Australia.

The respondents in their statement of claim alleged that prior to dedications of 1865 and 1866 Garden Island constituted Crown lands vested in Her Majesty in right of the sovereignty of the respondent State (then Colony); that the dedications had been revoked under the Crown Lands Consolidation Act, 1913 (N. S. W.), whereupon Garden Island became and continued Crown lands under that Act; that the appellant Commonwealth was in possession of the island and refused to give the respondents possession. They claimed (1.) possession; (2.) alternatively a declaration that they were entitled to possession; (3.) mesne profits from October 12, 1923.

The Commonwealth by its defence relied on the dedications of 1865 and 1866. It alleged that those dedications were in

perpetuity; that the Imperial Government and the Government of the respondent State had agreed that they should be treated as dedications in perpetuity so that Garden Island might be possessed and used by the Imperial Government for a naval depot for the purposes of the naval defence of the respondent State and the Empire, or possessed and used for the same purposes by any body or persons chosen by the Imperial Government to use them for the said purposes; that the Imperial Government had chosen the appellant Commonwealth to possess and use Garden Island for the said purposes, and that the appellant was so using the same by reason of such choice, and was in possession of the island with the consent and by the authority of the Imperial Government and not otherwise; and that the purported revocations of the dedications were invalid.

The facts, and the terms of the material enactments, appear from the judgment of the Judicial Committee.

The trial judge (Starke J.), after hearing the evidence, ordered that the case should be argued before the Full Court, which by a majority (Knox C.J., Gavan Duffy and Rich JJ.; Isaacs and Higgins JJ. dissenting), made the declaration above mentioned. The case is fully reported at 38 C. L. R. 74.

1928. Dec. 6, 7. *Macmillan K.C.*, *W. A. Barton*, and *Somervell* for the appellant.

W. A. Greene K.C. and *A. C. Nesbitt* for the respondents.

1929. Jan. 29. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This is an appeal by special leave from a judgment of the High Court of Australia, dated August 18, 1926, whereby it was declared that the State of New South Wales is entitled to possession of Garden Island, in the Harbour of Port Jackson in the same State, having an area of 18 a. 3 r. 17 p. or thereabouts.

The real question in the suit and on this appeal is whether, in the events which have happened, Garden Island falls within the definition of "Crown lands" contained in the

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Crown Lands Consolidation Act, 1913—namely, "Lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under the Crown Lands Acts." Stated in a more concrete form, it is whether dedications extending over the whole island made in the years 1865 and 1866 have been effectually revoked by action of the Minister purporting to have been carried out pursuant to the provisions of the above mentioned Act of 1913.

The judgment appealed from is that of the majority of the Court—namely, the Chief Justice and Gavan Duffy, Rich and Starke JJ. Isaacs and Higgins JJ. dissented; the former, for reasons expressed in an elaborate judgment, having come to the conclusion that the existing dedication was, in the events which had happened, permanent and irrevocable, and the latter on the ground that the alleged revocation thereof did not comply with the provisions of the Act and was therefore ineffectual.

Before stating the particular facts giving rise to this appeal, it may be convenient to state shortly the course of legislation affecting the question to be decided.

Garden Island was in 1855 part of the waste lands belonging to the Crown in the Colony of New South Wales.

On July 16, 1855, the royal assent was given to an Act (18 & 19 Vict. c. 54) by which Her Majesty in Council was authorized to assent to a Bill of the Legislative Council of the Colony of New South Wales for conferring a constitution on such Colony. The said Act contained a provision that the entire management and control of the waste lands belonging to the Crown in the said Colony should be vested in the legislature of the Colony, and a similar provision was also contained in the Bill above mentioned. The assent of Her Majesty in Council was in due course given to the Bill and the Constitution of New South Wales as a self-governing Colony was thus established.

By an Act of the Parliament of New South Wales passed on October 18, 1861, the expression "Crown Lands" was defined to mean—"All lands vested in Her Majesty which have not

been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted in fee simple."

The Act contained the following material provisions :—

"Sect. 3. Any Crown lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act but not otherwise. And the Governor with the advice of the Executive Council is hereby authorised in the name and on behalf of Her Majesty so to grant or dedicate any Crown lands."

"Sect. 5. The Governor with the advice aforesaid may by notice in the 'Gazette' reserve or dedicate in such manner as may seem best for the public interest any Crown lands for . . . . any purpose of defence . . . . or for any other public purpose. And upon any such notice being published in the 'Gazette' such lands shall become and be reserved or dedicated accordingly. . . . . Provided that an abstract of any intended reservation or dedication shall be laid before both Houses of Parliament one calendar month before such reservation or dedication is made."

Prior to this Act the legislature had not—unless possibly in particular cases of which the Board has no information—delegated to the Governor or any other public authority the power conferred upon them by the constitution of controlling and managing the Crown lands, and even now by the concluding proviso of s. 5 of the Act they reserve to themselves the right of being consulted before an intended reservation or dedication is made.

By an Act intituled the Colonial Fortifications Act, 1877 (an Act of the Imperial Parliament), Her Majesty was authorized by Order in Council to vest any fortifications, works, buildings or land in any colony held in trust for the defence of that colony in the Governor of that colony for such estate and interest and upon such terms and conditions and subject to such reservations, exceptions and restrictions as should be specified in the Order, and the Governor for the time being should by virtue of the Act and the Order take and hold (subject to the provisions of the Order) the premises transferred to and vested in him accordingly.

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By an Act of the Colonial legislature passed in the year 1884 power was conferred upon the Minister of Lands to revoke any dedication of Crown lands made before or after the passing of the Act, but as it is agreed that substantially the mode in which such revocation was to be carried out and the conditions subject to which the power was to be exercised were identical with those contained in the Consolidation Act, it is not thought necessary to repeat them here.

On July 9, 1900, the Commonwealth of Australia Act became law, and the Colony of New South Wales thenceforth became the State of New South Wales.

The Crown Lands Consolidation Act, 1913, contains the following material provisions :—

" Sect. 3. All proclamations and notifications heretofore made under the Code of 1861–80 or the Code of 1884–1912 as to (amongst other things) (*c*) ' the dedication of lands shall . . . . be deemed to have been made under the analogous provisions of this Act and may be . . . . revoked as if actually so made.' "

" Sect. 5. In this Act unless the context necessarily requires a different meaning the expression ' Crown Lands ' means lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under the Crown Lands Acts."

" Sect. 25. In any case in which the Minister shall be of opinion that the purposes for which any reservation or dedication of Crown Lands made before or after the passing of this Act have failed wholly or in part . . . . or that it is expedient in the public interest to resume the land which is the subject of such reservation or dedication . . . . or that the trusts annexed to any land reserved or dedicated under the Crown Lands Acts have failed or cannot reasonably be carried out, then and in every such case a notice under the hand of the Minister shall be published in the ' Gazette,' which notice shall set forth the mode in which it is proposed to deal with the reservation, dedication or land in question (hereinafter termed ' proposals '), a copy of which notice shall be laid

before both Houses of Parliament" within the time therein provided, with a provision enabling Parliament to declare by resolution that it does not assent to the proposals. "If no such resolution be passed then after the expiration of thirty clear days after the date when the notice was laid before Parliament it shall be lawful for the Minister to direct the proposals so notified to be carried out and the same shall be carried out accordingly, and for that purpose the Minister may revoke by notification in the 'Gazette' any such reservation or dedication. . . . . Upon the revocation under the provisions of this section of any dedication or grant and dedication the lands shall forthwith be vested in His Majesty, His Heirs and Successors and shall become Crown Lands within the meaning of this Act."

The "Code of 1861 to 1880," referred to in s. 3, includes the above mentioned Act of 1861, and the "Code of 1884 to 1912" includes the above mentioned Act of 1884.

The story resulting in the present litigation begins in the year 1856. In that year certain land on the mainland called Fort Macquarie was and had for some time previously been in the occupation of the navy. This land was not part of the "ordnance lands" granted by the Crown to certain officers of the ordnance in fee simple to be held for purposes of colonial defence, but had merely been reserved by the Crown for military or naval purposes. It being thought desirable that Fort Macquarie, being on the mainland, should be vacated by the navy and revert to the ordnance, and that Garden Island should be substituted for it and thenceforth be used as a naval depot, certain correspondence between the colonial secretary and representatives of the navy and of the Admiralty took place, and in the result an arrangement to this effect was carried out; a naval depot was established on the island, and Fort Macquarie was given back to the military authorities.

It will be observed that in this matter the legislature of New South Wales took no part in the arrangement; this was carried out by executive officers on either side, and there was no formal dedication of the island to naval purposes.

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From the legal point of view the obligations on either side were purely honorary.

This state of things not being considered satisfactory, steps were taken, after the passing of the Act of 1861 hereinbefore mentioned, to obtain a formal dedication of Garden Island for the purpose of a naval depot. This was carried into effect under s. 5 of the Act by two notices in the "Gazette" dated respectively January 10, 1865, and June 5, 1866, duly laid before Parliament, as required by the Act. It is agreed that, though the total acreage mentioned in these notices is less than the actual acreage of the island, the dedication was intended to cover, and did in fact cover, the whole island.

In a letter dated June 28, 1866, from the Governor to Commodore Sir W. Wiseman, representing the naval authorities, the dedication is referred to as "permanent," but it is to be observed that there is nothing in either of the notices to distinguish the dedication thereby effected from any other dedication of Crown lands. There was at this time no statutory power under which an executive authority could revoke a dedication, but the legislature, acting within the limits of the constitution, was supreme and could either directly revoke a dedication of Crown lands or delegate to an executive authority the power to do so. This it did first by the Act of 1884 and afterwards by the Consolidation Act of 1913. The Governor's letter cannot be regarded as anything more than an expression of his own view on the matter, and certainly cannot in any way impair the authority and powers of the legislature.

We have now arrived at a very important part of the story, and events happened which form the real ground for the dissenting judgment of Isaacs J., and they require therefore very careful consideration.

It will be remembered that under the Colonial Fortifications Act of 1877 hereinbefore mentioned Her Majesty in Council had power by order to vest fortifications and lands held in trust for the defence of the Colony in the Governor thereof.

In the year 1878 negotiations were started between the Imperial Government and the Government of New South Wales for the transfer under the Act of certain ordnance reserves in the Colony. These negotiations occupied several years, but eventually an agreement between the two Governments was arrived at to the effect that on the completion at the expense of the Colony of certain buildings and works partly on the mainland and partly on Garden Island an Order in Council should be made under the Act for the vesting in the Governor the ordnance lands and the buildings and so forth thereon.

The said buildings and works were carried out by and at the expense of the Colony and were completed in the year 1899. The sum expended by the Colony exceeded 300,000*l*.

The Order in Council was dated October 26, 1899. It recited that the lands described in the first schedule had been granted to officers of the ordnance for the use and service of that department and that the lands described in the second schedule, including Fort Macquarie, had been reserved for military or naval purposes, but had never been granted for ordnance purposes. It then recited that under the Act of 1861 hereinbefore mentioned Garden Island, described in the third schedule, had been dedicated for the purposes of a naval depot by the said two notices of January 10, 1865, and June 5, 1866. The Order mentioned the agreement for the erection and carrying out by the Colonial Government of the buildings and works above mentioned, and stated that one of the terms of the agreement was as follows:— "(4.) That as soon as these works were carried out to the satisfaction of the Commodore and the sites of the receiving depot and of the said residence should be conveyed, granted or dedicated in perpetuity for the use of Her Majesty's navy in the same way as Garden Island had been, the Imperial Government would surrender all the lands known as the ordnance reserves and all other lands or buildings in the Colony to which it might have any claim or title." And after stating in effect that the obligations of the Colonial Government under the agreement had been fulfilled and

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referring to the Act of 1877, Her Majesty by and with the advice of the Privy Council and in pursuance of the said Act was pleased to order that the lands described in the first and second schedules with the buildings and works thereon should, subject to a condition not material to the present question, be vested in the then Governor of New South Wales to the intent that the Governor for the time being should by virtue of the Act of 1877 and that Order, take and hold the said lands and the buildings and works thereon upon the trusts and purposes thereinafter declared, being in effect such trusts and purposes as the Governor with the advice of the Executive Council should by Order in Council direct.

With reference to this Order, it is only necessary to observe that it in no way purports to affect Garden Island or the powers under the constitution of the legislature of the Colony over the island or other Crown lands, and, in fact, the power by the Act of 1877 conferred upon Her Majesty in Council was strictly confined to the lands and so forth mentioned therein, which did not include Garden Island or any Crown lands properly so called. It should be remembered also that at the date of the Order the Act of 1884, conferring on executive authority the power of revoking dedications, was in operation. Moreover, the Order in Council was a unilateral instrument, being in effect a conveyance for an executed consideration of the lands specified therein, and does not purport to contain and would not from its nature properly contain any obligation on the part of the Colony other than the condition above referred to, which is a condition affecting only the lands conveyed.

At this point it is desirable to deal with that part of the learned and elaborate judgment of Isaacs J. in which he discusses the Order in Council and expresses his conclusion as to its effect. This appears to be that by virtue of the recital, including the incidental mention of the dedication of Garden Island as having been made "in perpetuity," and of the fact that the Order was made "in consideration of the premises," the Order imposed upon the Colony an obligation at no time to alter the then existing dedication

without the consent of the Imperial Government, and he even goes so far as to say that in his view the Order had the effect of an Imperial statute forbidding a revocation of or other interference with the dedication.

With all respect, their Lordships cannot agree with this view. In the first place, it seems to ignore the difference between a self-governing Colony or State and an individual. Acting within the constitution, the legislature of such a Colony or State is supreme, and no act of the executive Government could fetter in any legal sense the future exercise by it of its powers or give to any person a title other than such as could be conferred under existing legislation, including in the present case the Crown Lands Acts.

Assuming, therefore, for the purpose of argument, that if the Order in Council had been a conveyance by one individual to another, there would have been imposed upon the grantee an obligation not to alter the existing right in Garden Island, it could not have that effect in the actual case in question. But in truth the Order, as already pointed out, did not purport to alter the then existing title to Garden Island; that was of necessity left as it was. It is quite impossible to regard the Order as having the force of an Imperial statute except so far as it effects that which the Act of 1877 authorized—namely, the vesting in the Governor of the lands described in the first and second schedules. On this part of the case their Lordships entirely agree with the views expressed by Higgins J. and by the majority of the High Court.

To resume the statement of the facts: After the establishment of the Australian Commonwealth and the decision in the year 1909 of the Government and legislature to establish a naval unit of its own, Garden Island was vacated by the Imperial naval authorities and has since been occupied by those of the Commonwealth as a depot for "His Majesty's ships provided and maintained by the Commonwealth of Australia."

Differences having arisen between the Commonwealth and the State as to the terms on which Garden Island should be

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occupied by the former and the financial arrangements in reference thereto, and negotiations between the two Governments not having resulted in an agreement, the State on October 12, 1923, purported to revoke the dedication of Garden Island in accordance with the provisions of s. 25 of the Crown Lands Consolidation Act, 1913, and on May 26, 1924, commenced the present action for the purpose of having the respective rights of the State and the Commonwealth determined by the Courts.

In form the plaintiffs claimed (1.) possession of Garden Island, (2.) alternatively a declaration that they were entitled to possession, (3.) mesne profits from October 12, 1923. In substance, however, they sought to have it determined that the island was at the disposal of the State notwithstanding the previous dedication. The real question, therefore, is whether the revocation of October 12, 1923, was valid and effectual. Higgins J. gave judgment against the State on this point, and it therefore requires careful consideration.

The revocation purports to be made under the Crown Lands Consolidation Act, 1913, the relevant provisions of which are set forth above.

The "proposals" were dated August 10, 1923, and were under the hand of the Minister of Lands. After reciting the two notices of dedication of January 10, 1865, and June 5, 1866, respectively, and that the Minister was of opinion that the respective purposes for which the said dedications were respectively made had failed wholly, and that the trusts respectively annexed to the lands the subject of the respective dedications had failed and could not reasonably be carried out, and that it was expedient in the public interest to resume the whole of the said lands, therefore notice was given in accordance with the provisions of s. 25 of the Crown Lands Consolidation Act, 1913, that it was proposed to revoke the said respective dedications theretofore made.

By a further notice dated October 12, 1923, after reciting the notices of January 10, 1865, June 5, 1866, and August 10,

1923, and stating that a copy of such last mentioned notice was laid before both Houses of Parliament then in session within one month after the publication in the "Gazette," and that no resolution was passed by either House of Parliament that it did not assent to the proposals set forth in such notice and that thirty clear days had expired since such notice was laid before Parliament: therefore in pursuance of the section above mentioned the Minister directed the said proposals to be carried out and that the same should be carried out accordingly, and for that purpose he by that notification wholly revoked the said dedications.

Higgins J. expressed the view that there could be no valid revocation under the provisions of the Act of 1913 "until Parliament had had proposals laid before it for the future of the land." With all respect to the learned judge, their Lordships cannot agree with this view. The Act provides that the notice shall set forth "the mode in which it is proposed to deal with the reservation, *dedication* or land in question (hereinafter termed 'proposals')." If, therefore, as in the present case, the notice merely states that the mode in which it is proposed to deal with the dedication is by revoking it, that is a sufficient proposal. That this is the true meaning of the above mentioned provisions of the Act is, in their Lordships' opinion, confirmed by the last paragraph of s. 25, which provides that "upon the revocation under the provisions of the section of any dedication, or grant and dedication, the lands shall forthwith be vested in His Majesty, His Heirs and Successors, and shall become Crown lands within the meaning of this Act," namely, lands not permanently dedicated to any public purpose under the Crown Lands Acts. If, therefore, no "proposal" for a new dedication has been made provision for a future dedication is found in the Act itself.

As the result, their Lordships are of opinion that in substance the appeal fails and ought to be dismissed. They think, however, that in form the declaration that the State of New South Wales is entitled to possession of Garden Island is, in view of the provisions already referred to of the

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Act of 1913, not correct. They are of opinion that it should run as follows:—"This Court doth declare that Garden Island, in the Harbour of Port Jackson, in the State of New South Wales, having an area of 18 a. 3 r. 17 p. or thereabouts is now, by virtue of the revocation dated October 12, 1923, vested in His Majesty, His Heirs and Successors, and has become Crown lands within the meaning of the New South Wales Crown Lands Consolidation Act, 1913, and liable to be dealt with in accordance with the provisions of that Act."

They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Coward, Chance & Co.*
Solicitors for respondents: *Light & Fulton.*

Explained. COMR. OF STAMP DUTIES OF N.S.W. *v.* WAY [1952] A.C. 95

[PRIVY COUNCIL.]

J. C.* 1929 Jan. 31.

RABETT AND OTHERS . . . . . APPELLANTS;

AND

COMMISSIONER OF STAMP DUTIES . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Death Duty—Settlement—Trust to take effect "after" Settlor's Death—Reservation of Life Interest—Stamp Duties Act, 1920–1924 (*No.* 47 *of* 1920, *as amended; N. S. W.*), *s.* 102, *sub-s.* 2 (*a*) (*c*).

By a marriage settlement made in 1876 30,000*l.* was settled upon trust to pay the income to the settlor's wife for life, after her death to the settlor for life, and after the death of the survivor upon trust for the children or remoter issue as they should by deed jointly appoint, or in the absence of a joint appointment as the survivor should by will or deed appoint, and in default of appointment for the children as therein provided. The settlor died in 1925, without having exercised the joint power of appointment, leaving his wife and children him surviving.

For the purpose of death duty under the Stamp Duties Act, 1920–1924, of New South Wales:—

Held, that as the settlement contained a trust to take effect "after the death" of the deceased settlor and in reference thereto, his property

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* *Present:* LORD HAILSHAM L.C., LORD BUCKMASTER, VISCOUNT SUMNER, and LORD BLANESBURGH.

was by s. 102, sub-s. 2 (*a*), of the Act to be "deemed to include" the property subject to the trust, without deducting the value of his widow's life interest therein; the words "after the death" in the sub-section have a wider meaning than "on the death."

Held, further, that the same result followed under s. 102, sub-s. 2 (*c*), as the deceased settlor had reserved a life interest to himself, and it was not in accordance with the true conception of such a settlement to regard that life interest as being in the residue of the property after deducting the previous life interest.

Judgment of the Supreme Court of New South Wales, 27 S. R. (N. S. W.), 370 affirmed.

APPEAL (No. 43 of 1928) from a judgment of the Supreme Court of New South Wales (August 26, 1927) on a special case stated under s. 124, sub-s. 1, of the Stamp Duties Act, 1920–1924, of New South Wales.

The special case related to death duty payable under the above Act upon the death in 1925 of Sir William Charles Cooper, Bart., in respect of the value of the property subject to a marriage settlement made by the deceased in 1876. The question raised by the case was whether in computing the duty the value of the life interest of the widow of the deceased under the trusts of the settlement was to be deducted from the whole value of the property subject thereto.

The terms of the settlement and the material provisions of the Act appear from the judgment of the Judicial Committee.

The Supreme Court by a majority (Street C.J. and Gordon J.; Ferguson J. dissenting) held that the whole value of the trust property was to be included in the dutiable estate of the deceased. The case is reported at 27 S. R. (N. S. W.) 370.

1928. Dec. 6. *Needham K.C.* and *Wilfrid Hunt* for the appellants.

Hon. Geoffrey Lawrence K.C. and *A. C. Nesbitt* for the respondent.

1929. Jan. 31. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The questions raised on this appeal depend upon the true construction of s. 102 of the Stamp Duties Act, 1920–1924, which declares what classes of property are to be deemed to be included in the estate of a deceased

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person for the purpose of duties and arise out of the following circumstances.

By a marriage settlement, dated November 16, 1876, Sir William Cooper settled 30,000*l.* upon trust to pay the income to his wife for life, after her death to himself for life, and after the death of the survivor of them upon trust for the children or remoter issue of the marriage as he and his wife should by deed jointly appoint, or in the absence of such appointment as the survivor should by deed or will appoint, and in default of appointment among the children of the marriage as therein provided. Sir William Cooper died on September 2, 1925, without having exercised the joint power of appointment, leaving his wife and children him surviving and having made a will appointing as his executors the appellants by whom the will was duly proved. The Commissioner of Stamp Duties in assessing the duties payable upon the settlor's death claimed that the whole value of the settled property ought to be included in the estate and made subject to duty. The executors, on the other hand, contended that the value of the widow's life interest ought to be deducted and, before this Board, apparently for the first time, urged alternatively that the whole settled estate was exempt. The Commissioner, who had decided that the whole property was subject to duty, stated a special case for determination of the point by the Supreme Court of New South Wales, and they by a majority affirmed the decision of the Commissioner, and from their judgment the executors have brought this appeal.

The point for determination depends wholly upon the true construction of the New South Wales Stamp Duties Act No. 47, 1920, as amended by the statutes No. 20 of 1922, No. 16 of 1924, and No. 32 of 1924. These Acts deal with stamp duties generally. Part IV. of the Act of 1920 is set apart for the duties on death, and s. 101 provides that: "In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the third schedule to this Act, shall be assessed and paid—(*a*) upon the final balance

of the estate of the deceased, as determined in accordance with this Act."

Sect. 102 defines the property which is to be recognized as the estate of a deceased person, and states it shall be "deemed to include" among other property: (2.) (*a*) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person: Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust." It is by virtue of this provision that the duty has been assessed in the present case upon the settled property.

The appellants urge that the interpretation placed upon the statute is not only not justified by the actual words, but that the general scope of the Act shows the settled property ought not to be included. They contend that the statute by s. 101 only imposes duty on the actual estate of the deceased, and that property validly taken out of the estate before death cannot rightly be included. This argument would have weight but for the words of s. 102, which provide that the estate shall be "deemed to include" certain properties, and the meaning of these words is that if the enumerated property is not in fact part of the estate, it must be considered as though it were; in these circumstances it is little use dwelling on the similarity between the Act in question and Probate and other Acts which deal directly with the actual estate of the deceased.

Now the first words of s. 102, sub-s. 2 (*a*), include property which before the death of the deceased has been completely taken away from his estate by a settlement containing any trust in respect of the property "to take effect after his death." The appellants urge that this cannot refer to the life interest of the wife, since that had already vested in possession and had been taken away, and no subsequent trust arose until

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after her death, but the words of the section do not provide that the duty only attaches to property in respect of which the trust arises or takes effect on the death of the settlor but after his death, and their Lordships see no escape from the conclusion that property of the deceased settled by an instrument which contains trusts that take effect after and by reference to his death is to be deemed part of the estate. It is argued that the use of the words "by will" conflict with this construction, for it is impossible that a will can contain anything but provisions to take effect on and after the death of the testator, but their Lordships think that this difficulty is resolved by construing the qualifying words as applicable only to the settlement, and this in their view is the true interpretation of the section. The argument which excludes the value of the wife's life interest would equally apply to the interest of the children, for that also, if the joint power of appointment had not been exercised, would have been entirely taken away from the testator.

Ferguson J., in his dissenting judgment, faces this difficulty, and resolves it by concluding that if the testator's life interest had been first reserved, then the whole estate would have been subject to duty, but not otherwise: this conclusion depends on the assumption that the Act only relates to property subject to trusts that arise on the testator's death; but this is not the wording of the statute.

Nor can their Lordships assent to the view that as the testator might, had he thought fit, have given his wife in cash the present value of her life interest and then settled the remainder, the result is the same when he adopted a different method of disposition.

The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the settlement contains trusts to take effect after his death. In the present case the trusts that took effect after his death were: (1.) a trust enabling his widow alone to sell and vary investments; (2.) a trust enabling her if the joint power was unexercised to appoint among the children by deed or will; and (3.) a trust for the benefit of the children

in default of appointment and subject to their mother's life interest; and these trusts affected the whole settled property, and not that part only which would be left if the value of the wife's life interest were taken away.

Their Lordships think the same conclusion must be reached by considering the effect of s. 102, sub-s. 2 (*c*) (i.). This provision is in the following terms: "(2.) (*c*) Any property passing under any settlement, trust, or other disposition of property made by the deceased whether before or after the passing of this Act—(i.) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person."

Now there can be no doubt that in this settlement made by the testator there was a life interest reserved to him, and it is not in accordance with the true conception of such a settlement to say that it was a life interest in the residue of the property after the value of the previous life interest had been deducted.

On both provisions, according to the main argument of the appellants, the amount of duty would vary according to whether or no the testator's wife predeceased or survived him, but they can find nothing in the words of the statute to support that view.

For these reasons their Lordships think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Gregory, Rowcliffe & Co.*
Solicitors for respondent: *Light & Fulton.*

[PRIVY COUNCIL.]

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THOMSON AND OTHERS . . . . . APPELLANTS;

AND

COMMISSIONER OF STAMP DUTIES . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Death Duty—Settlement—Trust arising on Death of either Settlor or Wife—Death of Settlor—"Trust to take effect after his death"—Stamp Duties Act, 1898 (*No.* 27, *N. S. W.*), *s.* 58, *sub-s.* 1.

In 1896 a husband settled property in New South Wales, directing that the income therefrom should be paid to his wife during their joint lives, and upon the death of either of them to their daughters equally for their respective lives. The settlor died in 1914, and was survived by his wife:—

Held, that the settlement contained a trust "to take effect after his" (the settlor's) "death" within the meaning of s. 58 of the Stamp Duties Act, 1898, of New South Wales, and accordingly that upon the death of the settlor duty under that section became payable.

Judgment of the High Court of Australia, 40 C. L. R. 394 affirmed.

APPEAL (No. 117 of 1928) by special leave from a judgment of the High Court of Australia (December 10, 1927) reversing a judgment of the Supreme Court of New South Wales (July 1, 1926).

The appellants were the executors of A. W. Currie, who died in 1914, and the trustees of a post-nuptial settlement made by the deceased dated August 4, 1896. No duty was claimed upon the property included in the settlement until 1926, when the respondent claimed that duty was payable thereon under s. 49 or s. 58 of the Stamp Duties Act, 1898, as amended by the Stamp Duties (Amendment) Act, 1914, of New South Wales.

The sections above mentioned were repealed, but re-enacted by the Stamp Duties Act, 1920–1924.

The respondent assessed the duty at 9543*l.*, and the interest payable at 5631*l.* 13*s.* 6*d.*, which sums were paid under

* *Present:* LORD HAILSHAM L.C., LORD SHAW OF DUNFERMLINE, LORDC ARSON, LORD ATKIN, and LORD WARRINGTON OF CLYFFE.

protest. The respondent at the request of the appellants stated a case under the above Act for the opinion of the Supreme Court.

The material terms of the settlement of August 4, 1896, and of the Act appear from the judgment of the Judicial Committee.

The Supreme Court of New South Wales held unanimously that duty was not payable either under s. 49 or under s. 58. The proceedings are reported at 28 S. R. (N. S. W.) 195.

Upon appeal to the High Court of Australia the decision was reversed. The Court (Knox C.J., Isaacs, Higgins, Gavan Duffy and Powers JJ.) held, Isaacs J. dissenting, that the settled property was not liable to duty under s. 49 of the Act, but held (Knox C.J. and Gavan Duffy J. dissenting) that it was liable under s. 58. The appeal is reported at 40 C. L. R. 394.

1929. Jan. 29. *Barrington-Ward K.C.* and *W. A. Barton* for the appellants.

Hon. Geoffrey Lawrence K.C. and *A. C. Nesbitt* for the respondent, were not called on.

Feb. 19. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal, for which special leave was granted, from a judgment of the High Court of Australia dated December 10, 1927, reversing a unanimous decision of the Supreme Court of New South Wales of July 1, 1927.

There has been a variety of judicial opinion. The New South Wales Supreme Court was unanimous. The High Court of Australia reversed the judgment, Isaacs, Higgins and Powers JJ. favouring that course, with Knox C.J. and Gavan Duffy J. dissenting. The facts raising the case are as follows :—

By an indenture of settlement dated August 4, 1896, Mr. A. W. Currie, of Melbourne, settled certain lands upon the trusts about to be mentioned, and the appellants are trustees under that settlement. On September 3, 1914, Mr. Currie died, and the appellants are executors under his

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will and codicil. His wife died about nine years thereafter —namely, on July 13, 1923.

The sole question in the case is whether the property conveyed by the indenture of settlement was liable to duty as part of the deceased's estate in terms of the provisions of the Stamp Duties Act, 1898 (No. 27 of New South Wales), as amended by the Stamp Duties Amendment Act, 1914, No. 3.

The New South Wales Supreme Court decided that there was no such liability and the High Court of Australia decided that there was.

As will be presently noted, the terms of the destination in the indenture of settlement are somewhat peculiar; and it is important accordingly to make no pronouncement of a wider character on the taxing clauses of these Acts than is required by the application of the relevant provisions of the statute to the exact set of facts as they have arisen. Their Lordships appreciate the analysis given by the learned judges in the Courts below of s. 49 of the statute; but as in their judgment the question at issue between the parties is definitely concluded by s. 58, they rest their judgment upon the interpretation of the last mentioned section.

By s. 49, sub-s. 1, of the Act of 1898: "The duties to be levied, collected, and paid as aforesaid upon the estates of deceased persons shall be according to the duties mentioned in the third schedule to this Act; and such duties shall be charged and chargeable upon and in respect of all estate whether real or personal which belonged to any testator or intestate dying after the commencement of this Act."

By s. 49, sub-s. 2 (*b*), as amended by s. 36 of the Act of 1914: "All real estate (including chattels real) passing under a deed of gift or voluntary conveyance, whenever made by any person dying after the commencement of the Stamp Duties (Amendment) Act, 1914, of which bona fide possession and enjoyment has not been assumed by the donee or person to whom such conveyance has been made immediately upon the gift or conveyance and thenceforth retained to the entire exclusion of the donor or maker of the conveyance or of any benefit to him of whatsoever kind or in any way whatsoever."

By s. 58, sub-s. 1, as amended by s. 42 of the Act of 1914: "Within six months of the death of any person who has executed a settlement containing any trust to take effect after his death, or within such further time as the commissioner may allow, notice of such settlement shall be lodged by the trustee thereof or if there is no such trustee then by some person interested thereunder together with a declaration specifying the property thereby settled and the value thereof and duty thereon shall be payable on such value at the rates specified in the third schedule hereto. If such trustee or any such person fails to so lodge such notice and declaration he shall be liable to a penalty not exceeding fifty pounds."

These being the statutory provisions, the terms and trust purposes of the indenture of settlement may now be noted. At the date of the settlement Mr. Currie was possessed of certain lands forming the stations of "North Wakool" and "Rankeilour" in New South Wales with the stock thereon.

In the indenture of settlement of August 4, 1896, it was recited that he was desirous "of making a provision for his said wife and five daughters." It is witnessed that he and his said wife "respectively declare that she the said Jessie Currie, her executors or administrators, shall either retain and manage the said land as hereinafter provided so long as the said Archibald Currie during his life and after the death of the said Archibald Currie so long as the trustees or trustee for the time being of these presents shall think fit, or shall at the request in writing of the said Archibald Currie during his life and after his death" at the discretion of his trustees have power of sale, and certain consequential powers and discretions.

The deed then proceeds in the following terms: "And the said Jessie Currie shall during the joint lives of the said Archibald Currie and Jessie Currie retain for her own sole use and benefit as her separate estate and she shall not have power to dispose or deprive herself of the benefit thereof by anticipation the whole of the rents and profits, interest, dividends and income of the said land, moneys, stocks, funds, investments and securities, and after the death of either of

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them the said Archibald Currie or Jessie Currie, the trustees or trustee for the time being shall pay one-fifth part of the rents and profits, interest, dividends and income of the said land, moneys, stocks, funds, investments and securities unto each of the said five daughters of the said Archibald Currie during her life for her separate use." There follows a destination over of the fee.

The true question in the case is what is the period of time at which the destination to the daughters takes effect. Cases are common enough in the shape of a destination which takes effect by way of giving a life interest to the wife and thereafter the fee to the children or of giving a life interest postponed to that of the wife with the fee to the grandchildren or the children's other heirs. This is not a destination of that kind. It comes into operation expressly "after the death of either of them the said Archibald Currie or Jessie Currie," at which period "the trustees or the trustee for the time being shall pay." Accordingly the Board is of opinion that it is to that state of facts and no other that s. 58 plainly applies.

It appears to their Lordships clear that within six months after Mr. Currie's death the duty lay upon his trustees to conform to the provisions of s. 58 and to make a declaration specifying the property settled by the indenture and the value thereof. Nor does there appear to be any escape from the remaining part of the section that "duty thereon shall be payable on such value at the rate specified in the third schedule."

For the reason already stated it is desirable to avoid any further pronouncement, as the section so clearly and quite completely covers the situation which has arisen in fact. For the same reason the Board sets aside the argument that one could conjecture a different set of facts; in particular that the wife should have predeceased the husband and that in that event no duty would then be exigible, the destination having taken effect not after but before the disposer's death. It may quite conceivably be so, but no pronouncement is made on that in the present case which is decided, as the Act was meant to be applied—namely, not on facts reversed but on

facts as they stand. Here, as is seen, Act fits fact like hand and glove.

The case of *Rosenthal* v. *Rosenthal* (1) was referred to in argument, and one sentence from the judgment of Griffith C.J. may be referred to : " The general intention of the legislature evidently was that property disposed of by way of voluntary assignment taking effect wholly or in part after the death of the settlor should be placed on the same footing with regard to taxation as property disposed of by will or passing on intestacy."

Their Lordships entirely agree. Various authorities were cited which bear upon the meaning to be attached to the words " after the death," the discussion being whether that word " after " was to be confined in construction to immediately after or not. Such discussions are beside the point of the present case. The destination came into effect of course after Mr. Currie's death, and it is plain from s. 58 that the reckoning should be made, and even the information should have been given promptly after that event. This was not done, but that makes no difference now. There is no dispute between the parties as to the quantum of the duty and interest charged.

Their Lordships agree with the majority of the High Court of Australia, and will humbly advise His Majesty that the appeal should be refused with costs.

Solicitors for appellants : *White & Leonard.*
Solicitors for respondent : *Light & Fulton.*

(1) (1910) 11 C. L. R. 87, 92.

[PRIVY COUNCIL.]

J. C.*
1929
Feb. 1.

CANADIAN PERFORMING RIGHT SOCIETY, LIMITED . . . . . } APPELLANTS;

AND

FAMOUS PLAYERS CANADIAN CORPORATION, LIMITED . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Copyright—Grant of Interest in Copyright—Assignment of Performing Rights—Action by Assignee for Infringement—Absence of Registration of Grant—Copyright Act, 1921 (11 & 12 *Geo.* 5, *c.* 24; *Dom.*), *s.* 39.

An assignee of the performing rights in Canada of a copyright musical work cannot maintain an action under the Copyright Act, 1921, of Canada, for an infringement of those rights in the absence of registration under s. 39, sub-s. 1, of that Act.

Sect. 39, sub-s. 2, upon its true construction, prohibits a grantee of an interest in a copyright, either by assignment or licence, from maintaining any action under the Act unless his grant, and similar grants forming part of the chain of his title, have been registered.

Judgment of the Supreme Court of Ontario, 60 Ont. L. R. 614, affirmed.

APPEAL (No. 164 of 1927) by special leave from a judgment of the Appellate Division of the Supreme Court of Ontario (May 20, 1927) affirming a judgment of Rose J.

The appellants brought an action against the respondents in the Supreme Court of Ontario for an injunction and damages in respect of the public performance by the respondents of two musical works, which the appellants claimed were infringements of their rights.

The appellants, a company registered in Canada, owned or controlled the performing rights in a very large number of musical works by assignment from the Performing Right Society, Ld., a company registered in England. The assignment by the English Society as to the two works in question was in 1926; the English Society derived its title as to one

* *Present:* LORD HAILSHAM L.C., LORD BUCKMASTER, VISCOUNT SUMNER, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

of the works by an assignment in 1916 from the composer, and in the case of the other work by an assignment in 1916 from a London firm, who had acquired their rights in 1911 from the composer.

Among other defences to the action the respondents pleaded that the action could not be maintained because no assignment of the right had been registered in pursuance of s. 39 of the Copyright Act, 1921, of Canada. The provisions of that section appear from the judgment of the Judicial Committee.

The trial judge (Rose J.) gave effect to the above mentioned defence and dismissed the action. The Appellate Division (Latchford C.J., and Riddell, Middleton, Masten and Orde JJ.A.) unanimously affirmed that decision. The judgments in the respective Courts are reported at 60 Ont. L. R. 280 and 614.

1928. Dec. 10. *W. A. Greene K.C.* and *Hon. S. O. Henn Collins* for the appellants. The Copyright Act, 1921, in s. 39, sub-s. 2, deals with the rights of a grantee, either by assignment or licence, whose grant is registered, against a prior grantee, whose grant is not registered. The words at the end of the section, upon their true construction, refer only to an action between competing assignees. That appears from the words " such prior grant," which refer to the " subsequent assignee " mentioned just before. Had it been intended to preclude an assignee or licensee from maintaining an action for infringement, even against a person not claiming to be so, the legislature would have so provided separately and in clear language. The construction appealed from is not the necessary construction, and would impose upon assignees conditions which in many cases would be impossible of performance. Interests are frequently held under a chain of assignments, made outside Canada and before the Act, and in some cases by persons long since deceased or by companies since liquidated ; in these circumstances it would be impossible to produce the grants in duplicate as required by s. 39, sub-s. 1. The construction adopted conflicts with the

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Berne Convention, which is scheduled to the Act. Art. 4 of the Convention provides that the enjoyment of the rights hereby referred to " shall not be subject to any formality."

Tilley K.C. and *Horace Douglas* for the respondents. The only copyright existing in Canada is that conferred by the Copyright Act, 1921. Sect. 39 deals with the grants of an interest in a copyright, and provides that they may be registered; it does not deal merely with the rights of grantees inter se. The words at the end of sub-s. 2 clearly preclude a grantee whose grant is unregistered from maintaining " any action under this Act." The effect of the words " his and each such prior grant " is that the whole chain of assignments or licences, whichever they are, is to be registered. The hardship alleged is a matter for the legislature. The provision as to registration affects merely the enforcement of rights in Canada, not the validity of the rights.

W. A. Greene K.C. replied.

1929. Feb. 1. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. The appellants, the plaintiffs in the action, are the owners by assignment of the performing rights in Canada of a very large number of musical works, the copyright in which is still subsisting.

The action in which the present appeal arises was an action under the Copyright Act, 1921, of Canada, against the respondents for an injunction and damages in respect of the infringement by the respondents of the exclusive performing rights in Canada of two of the said musical pieces.

The respondents, amongst other grounds of defence, alleged that the appellants could not maintain the action, because of their failure to register the grants under which they claimed title as required by s. 39 of the above mentioned Act.

The action was tried before Rose J., who on March 7, 1927, delivered judgment overruling the various grounds of defence other than that of failure to register, but allowing the latter ground. He therefore dismissed the action with costs.

The appellants thereupon appealed to the Appellate Division of the Supreme Court of Ontario which, by a unanimous judgment dated May 20, 1927, dismissed the appeal with costs.

By an Order of His Majesty in Council dated November 3, 1927, special leave was given to enter and prosecute the present appeal. The facts are not in dispute.

At the date of the assignment next hereinafter mentioned, the exclusive right of performing in public in all parts of the world the musical pieces, the subject of the action, was by virtue of certain prior assignments vested in the Performing Right Society, Ld. (hereinafter called the British Society).

By an indenture dated February 15, 1926, and made between the British Society, thereinafter called the assignor of the one part, and the appellants, thereinafter called the assignee, of the other part, the assignor assigned to the assignee the right of performance in Canada of the music of (amongst a large number of other musical works) the musical works the subject of this action. At the date of the said indenture the British company, by virtue of s. 41, sub-s. 1, of the Copyright Act, 1921, was entitled to the sole right to perform the said musical works in public, and such right was by virtue of s. 11, sub-s. 2, of the same Act effectually transferred to the appellants by the said indenture.

The infringement of the appellants' right by the respondents is admitted, and but for the several grounds of defence above referred to the appellants' right to maintain the action is clear.

Inasmuch as their Lordships agree with the view of the Courts below on the point on which the case was decided in Canada, it is unnecessary to consider any of the other grounds of defence set up by the respondents.

The question turns entirely on the construction of s. 39, sub-s. 2, of the Copyright Act, 1921.

Sect. 39 of that Act is as follows: "(1.) Any grant of an interest in a copyright either by assignment or license may be registered if made in duplicate upon production of both

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duplicates to the Copyright Office and payment of the prescribed fee—one duplicate shall be retained at the Copyright Office and the other shall be returned to the person depositing it with a certificate of registration. (2.) Any grant of an interest in a copyright, either by assignment or license, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice unless such assignment or license is registered in the manner directed by this Act before the registering of the instrument under which a subsequent assignee or licensee claims, and no grantee shall maintain any action under this Act unless his and each such prior grant has been registered."

The appellants are indisputably "grantees," their "grant"—namely, the assignment to them executed by the British company—has not been registered, the action is an action under the Act; therefore, reading the words literally, they are precluded from maintaining the action. The above is the effect of the several judgments in Canada, and their Lordships can see no answer to the respondents' case as thus stated.

Strenuous efforts, however, have been made by counsel for the appellants to induce their Lordships to accept a construction other than the literal one, and it is necessary therefore to consider whether such a construction is the correct one. Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible, when occasion arises to register an assignment, to obtain a duplicate without which, as it would appear, registration is impossible.

One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship. On this point it may be pointed out that though the Act received the Royal Assent on June 4, 1921, it did not come into operation until January 1, 1924, and there was ample time for persons interested to point out defects and endeavour to obtain their removal.

Of course, if it could be established that the provision in question is capable of two meanings, one of which would produce a reasonable and the other an unreasonable and unjust result, much might be said in favour of adopting the former. But it is here that the appellants' difficulty arises. The main endeavour on the part of counsel for the appellants was to show that the concluding words are a complement to the earlier part of the sub-section, and are to be confined to cases where the action is one between competing grantees, and stress was laid on the words "each such prior grant" as referring, they maintained, to the grant to which that of the "subsequent assignee," mentioned in the section, is subsequent in point of date. But in the first place "each such prior grant" suggests that there may be more than one, and in the second there is a sensible meaning for the words which fits in with the wider construction adopted by the Courts in Canada. The words to be construed are "his," i.e., the grantee's, "and each such prior grant"—namely, "his grant and each such prior grant." The natural meaning of these words is, in their Lordships' opinion, "his grant and each grant such as his own and prior in date thereto." The statute would then require him to register his own grant and every prior grant of the same nature, comprising the same subject-matter and conferring the same interest therein as that made to himself. So construed, the words would distinctly point to grants forming part of the chain of title as those to be registered. If the words are construed, as the appellants say they ought to be, they might require the grantee, who has registered his grant and as against whom therefore the prior grant is void, to register that grant before he could bring an action against the holder of it—surely, a most unreasonable requirement.

The first part of the sub-section it is true left open the question what if any right of action would be in the holder of either grant if neither was registered, but the legislature by the general words it has used has covered this point by making registration an essential condition to the maintenance of any action.

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For these reasons their Lordships are of opinion that the order appealed from ought to be affirmed and this appeal dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *Syrett & Sons.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1929 *Feb.* 18.

GANAPATHY PILLAY . . . . . APPELLANT;

AND

ALAMALOO AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATED MALAY STATES (STATE OF SELANGOR).

Will—Construction—Distribution of Trust Fund—Share of Child of deceased Beneficiary—Original Share—Accrued Share—Survivor.

A will provided that at the expiration of twenty-one years from the death of the testator a trust fund should be divided into five shares, that one of such shares should be paid to each of the testator's four sons, and that in the event of any of the sons dying before the period expired leaving a child or children such child or children should take the share to which such son would have been entitled if he had survived, and in default of issue of any son the share of such son should be payable to the surviving sons equally:—

Held (the English rules of construction being admitted to be applicable), that the child of a son who died before the expiration of the period was entitled only to the one-fifth share which his father would have taken, and was not entitled to participate in the share of a son who died before the expiration of the period without issue.

Judgment of the Court of Appeal of the Federated Malay States reversed.

APPEAL (No. 81 of 1928) from an order of the Court of Appeal of the Federated Malay States, State of Selangor (November 29, 1927), dismissing an appeal from part of an order of the Supreme Court of the States upon an originating summons for the construction of a will of a testator who died in 1902.

**Present:* LORD HAILSHAM L.C., LORD DARLING, and SIR CHARLES SARGANT.

The present appeal related to the respective rights of the appellant and the second respondent under provisions in the will (set out in the judgment of the Judicial Committee), for the distribution of a trust fund on the expiration of twenty-one years after the death of the testator. Of the four sons therein named Parimanum died in 1917 intestate, leaving him surviving no widow but one child, namely the second respondent Tambusany. Komarasamy died in 1911, leaving no widow but one child, namely Achikannu who died intestate in 1925. Mootoosamy (also called Ratanam) died in 1913, leaving no widow or issue. Ganapathy, the appellant, was the only surviving son. The first respondent was the sole executrix and trustee of the will.

The summons was heard by Gompertz C.J., who held that the respondent Tamboosamy and the appellant Ganapathy were each entitled to a one-fifth share of the trust fund, plus half of one-fifth, being half the share of Mootoosamy, deceased. The Court of Appeal (Acton and Thorne JJ.) affirmed that decision.

1929. Feb. 1. *Galbraith K.C.* and *Sir A. Underhill* for the appellant. Tamboosamy was entitled only to his father's one-fifth share. The "share" throughout means one of the one-fifth shares into which the fund is directed to be divided. The share of a son who dies before the twenty-one years without issue is payable to the surviving sons equally, without any provision for the substitution of the issue of a son who has died during the period. A provision to that effect should not be taken as implied: *Inderwick* v. *Tatchell* (1); *King* v. *Frost* (2); Jarman on Wills, 6th ed., pp. 2100, 2105. Conditions attached to original shares do not apply to accrued shares without a particular and distinct indication of that intention: Jarman, p. 2115. The Court of Appeal misapprehended *Eyre* v. *Marsden*. (3)

Jenkins K.C. and *Braund* for the respondent Tamboosamy. If this respondent's father had survived the period named he would have been entitled not only to his original share,

(1) [1903] A. C. 120. (2) (1890) 15 App. Cas. 548.
(3) (1839) 4 M. & C. 231.

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but also to participate in the share of Ratanam, who had died without issue. By the terms of the will this respondent is entitled to the share which his father "would have taken if he had survived." In dealing with the share of the fund which a child of a deceased son is to receive the survival of the father is in terms hypothesized, therefore no words as to his issue are needed. The respondent's construction is supported by *In re Hunter's Trusts* (1) and *Leeming* v. *Sherratt.* (2) Ratanam died before Tamboosamy's father, therefore no double contingency is involved.

Galbraith K.C. in reply referred to *Scalé* v. *Rawlins.* (3)

Greenland for the first respondent, the executor.

Feb. 18. The judgment of their Lordships was delivered by

SIR CHARLES SARGANT. This appeal concerns the distribution of the residuary trust funds held under the will dated May 20, 1898, of a testator, K. Tamboosamy Pillay, who died in the year 1902. By that will, after giving directions for the sale, conversion and investment of his real and personal estate and constituting thereout a residuary trust fund (therein called "the trust funds"), the testator directed that for a period of twenty-one years after his death certain shares or parts only of the income of the trust funds should be paid and applied as therein mentioned, and the residue of the income of the trust funds should be accumulated by investing the same and the resulting income thereof to the intent that such accumulations should be added to and form part of the corpus of the trust funds. And after certain further directions not material to be here stated the testator made a final direction and bequest in the terms following: "And I direct my trustees on the expiration of twenty-one years after the date of my death to divide my trust funds into five shares and to pay one of such shares to my said wife and such share shall be held to vest in her at the date of my death and to pay one other of such shares to each of my said sons Parimanum, Komarasamy, Mootoosamy also called Ratanam, and Ganapathy and in the event of any

(1) (1865) L. R. 1 Eq. 295. (2) (1842) 2 Ha. 14.
(3) [1892] A. C. 342.

such son of mine dying before the expiration of such period of twenty-one years leaving child or children him surviving such child or children and if more than one equally between them shall take the share to which such son of mine would have been entitled if he had survived such period of twenty-one years and in default of issue of any son the share of such son shall be payable to the surviving sons equally between them subject to such provision as my trustees shall think fit in their absolute discretion to make for the surviving widow of any son."

The general legal character of the interests created by these words of gift is reasonably clear. The widow's interest in her one-fifth, though postponed in possession for twenty-one years, is immediately vested and is indefeasible. On the other hand, the similarly postponed interest of each of the sons in his one-fifth is also immediately, though not indefeasibly, vested and is liable to be divested and given over should he die before the expiration of the term of twenty-one years from the testator's death; and in that case two alternative and mutually exclusive events are considered and provided for in somewhat loose language. In the first event —namely, of his death, leaving a child or children him surviving—the share he would have been entitled to had he survived is given to such child or children. In the second event—namely, of his death without leaving issue (it is fortunately unnecessary to construe this word)—his share is given to the surviving sons.

In the arguments and to some extent in the judgments in the Courts of the Federated Malay States expressions have been used which imply or suggest that the interests of the sons were not vested till the expiration of the term of twenty-one years, and also that the case was one in which ordinary questions of accruer have to be considered. In their Lordships' view neither of these implications nor suggestions is correct. The terms of the original gift to the sons are such as to create a plain vested gift, and the subsequent alternative gifts operate by way of divesting in certain events that vested gift. On the other hand, though the original gift

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to each son of his share is vested, there is not prior to the expiration of the term of twenty-one years any intermediate gift over as between the sons or their issue of the shares of sons dying successively within the period, such as would or might involve the ordinary problems as to accruer and the ultimate destination of accrued shares. The position of each son as to survivorship or as to prior death either with or without leaving issue has to be considered at one definite date and one date only—namely, the expiration of the fixed period of twenty-one years from the testator's death.

This view of the case was not seriously contested by Mr. Jenkins in his able argument for the respondent Tamboosamy; but he urged with a good deal of force that the gift to the children of a deceased son was not of that son's original share only, but of the share to which he would have been entitled had he survived the period of twenty-one years; and he contended that, in considering what the son would have been entitled to in that event, the Court should have regard to the subsequent hypothetical enlargement of the son's share by possible survivorship. But, when carefully examined, this contention is more plausible than sound, and appears to amount to an attempt to combine the result of two mutually exclusive alternatives, and to take away from a surviving son in favour of his nephews or nieces a part of the share of a deceased and childless brother which, under the second alternative gift, is given in its entirety to the surviving son. It seems impossible to do this without contradicting to this extent the second alternative gift, and the only way of avoiding such a contradiction, and yet arriving at the result advocated by Mr. Jenkins, would be to read the phrase "surviving sons" as meaning surviving by themselves or by their issue. Such a construction would be contrary to well established principles, and, indeed, was not pressed for the respondent Tamboosamy.

The case of *In re Hunter's Trusts* (1) was relied on for the respondent and has some resemblance to the present case. But the decision there does not rest on or lay down any rule

(1) L. R. 1 Eq. 295.

or principle of general construction, and depends solely on the particular language of the will there in question. And to construe the reasonably clear words in the present will by the light of the construction given to the somewhat similar provisions in that will would be to offend against the principles clearly laid down in *Scalé* v. *Rawlins* (1) and in many other cases. The present will is one in which very little, if any, assistance is to be derived from the interpretation of other wills.

It may be added that the hypothetical character of the phrase " the share to which such son of mine would have been entitled had he survived such period of twenty-one years " is sufficiently satisfied by considering the words of contingency as referring to the possibility of the failure of the son to live to obtain the personal enjoyment of his share.

For the foregoing reasons their Lordships are compelled with respect to differ from the conclusions both of the Chief Justice and of the Court of Appeal, and to hold that, on the true construction of the will in question, on the expiration of the period of twenty-one years from the death of the testator the appellant Ganapathy Pillay took, in addition to his original fifth share of the residuary trust funds called in the will " my trust funds," the entirety of the original fifth share of his brother Ratanam, deceased; that K. T. Achikannu (since deceased) took the original fifth share of her father, K. T. Komarasamy Pillay, and that the respondent P. Tamboosamy took the original fifth share of his father Parimanum.

In discharging the order of the Chief Justice some difficulty would appear at first sight to arise from a part of that order being expressed to be made by consent—namely, that the respondent P. Tamboosamy and the appellant were each entitled to one-half of the estate of K. T. Achikannu, being one-fifth of the trust funds. It was afterwards pointed out by Acton J. in his judgment that this, though wrong in point of form, made no difference in substance, because though on the view then taken Achikannu was strictly entitled to one-fifth

(1) [1892] A. C. 342.

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plus one-fifteenth of the trust funds, and the appellant and the respondent P. Tamboosamy were strictly entitled to one-fifth and one-fifteenth each only of the trust funds, yet this was put right in substance by the fact that the appellant and the last named respondent became entitled between them to the estate of Achikannu on her subsequent death. On the decision now being given the share of Achikannu was, in fact and apart from consent, that which it is stated to be in the order of September 8, 1927—namely, one-fifth—and as that fact will be independently stated in the order of His Majesty in Council, it seems desirable to strike out from the order of the Chief Justice the similar declaration expressed to be by consent.

In the result the order of the Chief Justice should be discharged except so far as it directs the taxation and payment of costs ; the whole of the order of the Court of Appeal should also be discharged ; a declaration should be substituted as to construction to the effect hereinbefore stated. The costs of the respondent Alamaloo as between solicitor and client and those of the appellant and the respondent P. Tamboosamy as between party and party, both of the appeal to the Court of Appeal and of the appeal here, should be paid out of the four-fifths of the estate other than the fifth bequeathed to the respondent Alamaloo, and the respondent P. Tamboosamy should repay to the appellant any costs paid by the latter under the order of the Court of Appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Whites & Co.*

Solicitors for respondent Tamboosamy: *Gush, Phillips, Walters & Williams.*

Solicitors for executor respondent : *Nisbet, Drew & Loughborough.*

[PRIVY COUNCIL.]

ROBINSON . . . . . APPELLANT;

AND

STATE OF SOUTH AUSTRALIA . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australia—Wheat Harvest Acts, 1915–17—*Transfer of Certificates for Supplementary Advances—Transferee's Right of Action against Government for Negligence.*

When an owner of wheat who has delivered it to the Government of South Australia under the Wheat Harvest Acts, 1915–17, indorses and delivers the certificate for supplementary advances issued to him, there passes to the transferee, not only the right to receive the advances, but also the right of the owner under *Welden* v. *Smith* [1924] A. C. 484 to sue the Government for damages for negligence in the care and handling of the wheat so delivered for the year whereby the amount payable under the certificates is diminished.

Bloch v. *Smith* [1922] S. A. S. R. 95 and *Wolrige* v. *State of South Australia* [1927] S. A. S. R. 1 disapproved.

Judgment of the Supreme Court of South Australia reversed.

APPEAL (No. 118 of 1928) by special leave from a judgment of the Supreme Court of South Australia, delivered February 17, 1928.

The appellant brought an action in the Supreme Court of South Australia against the respondent State alleging by his statement of claim that he was the holder by indorsement and delivery of five certificates for supplementary advances issued by the Government of South Australia to the indorsees, owners of wheat who had delivered their 1916–17 wheat to the Government under the Wheat Harvest Acts, 1915 and 1916, also that another owner who had so delivered his wheat had assigned to the plaintiff in writing all money which should become owing to him and any claim which he might have against the Government in respect thereof; and that the Government had been negligent in the storing and handling of the 1916–17 wheat delivered under the Acts whereby it

* *Present:* LORD HAILSHAM L.C., LORD SHAW OF DUNFERMLINE, LORD CARSON, LORD ATKIN, and SIR CHARLES SARGANT.

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was damaged to the detriment of the holders, transferees, and assignees of the certificates. He claimed a declaration that he was entitled to compensation, and incidental accounts and inquiries. The respondent State by its defence denied the facts alleged and contended that in law the appellant had no cause of action.

The points of law arising were ordered to be set down for hearing, and were argued before Murray C.J.

The facts alleged and the terms, so far as relevant, of the certificates, appear from the judgment of the Judicial Committee.

The learned Chief Justice, following *Bloch* v. *Smith* (1), held that the appellant, as holder and indorsee of the certificates, was not entitled to maintain the action; he also held that under s. 6 (vi.) of the Supreme Court Act, 1878, of South Australia, the Court could not give legal effect to the assignment in the absence of express notice in writing to the person liable, nor could it be enforced as an equitable assignment, since the assignor had not been joined as a party.

1929. Jan. 24, 25, 28. *W. A. Greene K.C.* and *Stamp* for the appellant. In *Welden* v. *Smith* (2) the Privy Council, reversing the High Court of Australia, held that an owner of wheat who had delivered it under the Wheat Harvest Act had a right of action against the Government if the aggregate of wheat delivered was not treated with care. A transferee of a certificate for supplementary advances obtained, together with the right to the appropriate share of the pool, all rights affecting its administration. These were not separate rights; both were parts of the owner's right to have the contract properly carried out, and that right was transferred. After delivering the certificates to the appellant, the owner had no document recording the transaction with the Government. *Bloch* v. *Smith* (1), which was earlier than the judgment of the Privy Council above referred to, and the later decision of *Wolrige* v. *State of South Australia* (3)

(1) [1922] S. A. S. R. 95. (2) [1924] A. C. 484.
(3) [1927] S. A. S. R. 1.

were both wrongly decided. Further, the assignment was effectual in equity. In the circumstances of the case the absence of the assignor as a party when the case came before the Court was not an insuperable objection: *Performing Right Society* v. *London Theatre of Varieties* (1); *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2)

Jowitt K.C. and *Sir Robert Aske* for the respondent State. The certificates were not in the form of contracts, nor were they documents of title. Under the certificates the owner had merely the right to receive his appropriate part of the proceeds of the pool; the rights which he had under *Welden* v. *Smith* (3) were based upon the contract between himself and the Government. The transferee of the certificates obtained merely the former rights. If a holder transferee has wider rights confusion would arise in the event of a succession of transfers of a certificate. The transferees' position was analogous to that of an indorsee of a bill of lading before the passing of the Bills of Lading Act, 1855. A tortious act does not give a cause of action to a person merely because a contract is thereby made less remunerative to that person: *Cattle* v. *Stockton Waterworks Co.* (4) With regard to the assignment, s. 6 (vi.) of the Supreme Court Act, 1878, unlike s. 25 of the (English) Judicature Act, 1875, applies to equitable as well as legal assignments, and in both cases precludes an assignee from suing unless he has given notice of his assignment. If English law as to equitable assignments applies there were no special circumstances which enabled the appellant to sue without making the assignee a party.

Stamp in reply.

Feb. 28. The judgment of their Lordships was delivered by

SIR CHARLES SARGANT. This appeal from the Supreme Court of South Australia, like the previous appeal from the High Court of Australia in *Welden* v. *Smith* (3), raises as a point of law the question whether the Government of South

(1) [1924] A. C. 1.
(2) [1905] A. C. 454, 462.
(3) [1924] A. C. 484.
(4) (1875) L. R. 10 Q. B. 453.

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Australia can be made liable for loss caused by the negligence (if any) of its servants and agents in the execution of the duties of the Government under the Wheat Harvest Acts, 1915–17, of South Australia. On the previous appeal it was held that, as a matter of law, such a liability was capable of being established and enforced in the case of an owner who had delivered wheat to the Government and had signed an agreement in the form scheduled to the Act of 1915. The present appeal raises the further question whether, as a matter of law, a corresponding liability is capable of being established and enforced, not by the original owners, but by persons claiming from or under them as transferees and holders of certificates which are compendiously entitled "Government certificates for supplementary advances," or, at any rate, by such of the said transferees and holders as had obtained from the original owners express assignments in writing of the rights of such owners in respect of the wheat sold and delivered by them.

The portions of the statement of claim in the present action which are material to be stated are as follows. Paras. 2 and 3 stated that a large number of owners of wheat delivered their wheat, known as 1916–17 wheat, and referred to in the Wheat Harvest Acts by that term, to the Government of the State of South Australia for sale on their behalf respectively, and signed agreements in the form set out in the schedule to the Wheat Harvest Act, 1915; and that amongst the deliveries so made were the seven separate quantities of wheat which, with the names of the owners, the dates of delivery, and the denoting numbers of certificates therefor, were set out in a schedule to para. 3. Paras. 4, 5 and 6 stated the delivery by the Government to each owner of a certificate for payment of 2*s*. 6*d*. per bushel as for first advance on the wheat delivered, and also of a certificate entitled "Government certificate for supplementary advances on wheat, 1916–17 harvest," such certificates being in the form fully set out in para. 5; and alleged an undertaking by the Government to market the wheat on behalf of the owners who delivered the same. Para. 7 of the statement

of claim contained an averment, the precise language of which is important—namely: "The certificates for supplementary advances described in paragraphs 4 and 5 hereof have from the time of their issue been and are, by the usage and custom of merchants, bankers, investors, and dealers, and the public and of the Government of South Australia, negotiable, so that upon endorsement and delivery by the owner of wheat named in each one of them and afterwards by delivery, all the rights of the owner of wheat named therein in respect and relation of and to the wheat named therein, and the proceeds thereof and the advances and payment to be made thereon, have passed and pass to the bearer thereof."

Paras. 8 and 9 contained allegations as to negligence on the part of the Government in the storage and keeping of the wheat delivered them. Para. 10 stated that each of the five certificates representing the first five quantities of wheat specified in the schedule to para. 3 had, before the commencement of the action, been duly indorsed, transferred and delivered, and that the plaintiff had purchased and acquired the same and was the transferee, owner and bearer thereof, and the holder in due course thereof, and entitled to all the rights and benefits represented thereby; and finally alleged (apparently as a legal consequence) that the plaintiff was entitled to all rights and benefits to which the owner of the wheat named therein would be entitled if he had continued to hold, bear and own the said certificates. Paras. 11 and 12 stated that many other persons were in the same position as the plaintiff as holders of certificates similar to those specified in para. 3, and that the aggregate of the returns for 1916–17 wheat sold by the Government would be much less than they would have been but for the carelessness and negligence of the Government.

Para. 13 dealt separately with the last two of the seven quantities of wheat specified in the schedule to para. 3, and stated an assignment in writing of January 29, 1927 (being a few days before the date of the writ in the action), whereby William Gum, the original owner and vendor of those two

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quantities of wheat to the Government, transferred and assigned to the plaintiff absolutely as therein mentioned all the right, claim and interest of the assignor in the two certificates relating to the said last two quantities of wheat, and all moneys due or to become due to the assignor in respect of the wheat of the 1916–17 harvest mentioned in the said certificate, and also all the interest of the assignor in any claim which he had against the Government in respect of the said wheat, and in respect of anything done or omitted to be done by the said Government, its servants or agents in respect of the said wheat.

The defence of the Government raised as an objection in point of law, that the statement of claim disclosed no cause of action or any sufficient or lawful obligation on the part of the defendant to the plaintiff. It also contained a general traverse of the plaintiff's allegations as to negligence on the part of the defendant. The reply of the plaintiff, so far as material to be here stated, joined issue on the defence, and a rejoinder by the Government joined issue on the reply. In this state of the pleadings, by order made on April 27, 1927, it was ordered that the points of law raised by the defendant in the defence and rejoinder, and by the plaintiff in his reply, be set down for hearing at once. This hearing would have taken place before the Full Court, but it subsequently appeared that all the judges, with the exception of Murray C.J., had been concerned at one time or another in the action in question, or similar actions, while at the Bar; and therefore the questions were referred back in order that they might be taken by the Chief Justice. On this reference back judgment was given on February 17, 1928.

The points of law submitted to the Chief Justice were, as appears by his judgment, two in number—namely, (1.) that the plaintiff had no cause of action by virtue of his being the mere holder or bearer of certificates for supplementary advances; and (2.) that he had no cause of action as assignee of the rights of William Gum, inasmuch as he did not allege that he gave notice of the assignment to the defendant.

As regards the first point, the learned Chief Justice held that the point was settled so far as he was concerned by the judgment of the Full Court in *Bloch* v. *Smith* (1); and without giving further reasons decided the point in favour of the defendant. The second point was a new one, and as regards that the learned Chief Justice delivered a long and exhaustive judgment, which in the result was also in favour of the defendant. From the judgment on both points so delivered the plaintiff subsequently obtained special leave to appeal direct to His Majesty in Council.

The first point is, as has already been indicated, of greater importance than the second, as applying to and governing a much larger class of pending actions. The judgment in *Bloch* v. *Smith* (1) and its subsequent affirmation in the High Court of Australia (2), following the decision of that Court in *Welden* v. *Smith* (3), were both delivered before that decision of the High Court had been reversed by this Board on appeal: *Welden* v. *Smith.* (4) Accordingly, the reasoning in *Bloch* v. *Smith* (1), so far as applicable to this first point, has to be considered in relation to the judgment of this Board in *Welden* v. *Smith.* (4) There is one further authority on this first point—namely, the decision of Murray C.J. in *Wolrige* v. *State of South Australia* (5), a decision given some time after the decision of this Board in *Welden* v. *Smith.* There, as here, there came into question the right to sue of a transferee and bearer of certificates for surplus advances. And in that case the learned Chief Justice drew a distinction between an original owner of wheat with whom the Government had originally contracted, like the plaintiff in *Welden* v. *Smith* on the one hand, and a mere transferee and bearer of certificates with whom there was no such original contract; and decided that a plaintiff in the latter position had no right to sue for damages for negligence.

It appears, therefore, that although in form the present appeal is, as regards the first point, an appeal from the

(1) [1922] S. A. S. R. 95
(2) Unreported; the appeal was dismissed without argument, the appellant not appearing.
(3) (1923) 30 C. L. R. 585.
(4) [1924] A. C. 484.
(5) [1927] S. A. S. R. 1.

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decision of Murray C.J. in the present action, it is, in substance, an appeal from the decisions in *Bloch* v. *Smith* (1) and *Wolrige* v. *State of South Australia* (2), and more especially from the latter of the said two decisions.

In the course of the opening of the present appeal before their Lordships' Board a difficulty arose from the language of para. 7 of the statement of claim, and to a slighter extent from the language of the last part of para. 10 thereof. For, read strictly and literally, this language amounted to an assertion that the assignees and holders for the time being of the certificates for supplementary advances had precisely the same rights against the Government of South Australia as the farmers with whom the original contracts were made. And on this strict and literal reading of the language, the plaintiff was placed in precisely the same position as towards the Government as that occupied by the plaintiff in *Welden* v. *Smith* (3), and was necessarily entitled to succeed on the first point of law. Such a result would, however, have been quite foreign to the interest of the parties, and would have entirely defeated their desire to have the real point of law decided, both in this action and in the numerous other similar actions that are now pending. And, accordingly, by agreement in writing between the counsel for the parties, the following explanation was adopted of the meaning of para. 7, and so far as necessary of para. 10—namely: "That the certificate as between farmers and assignees and as between assignees, inter se, have been transferred on the footing that such transfer without more had the effect of transferring legal rights to the transferees but without any further definition of the extent of such legal rights than is to be inferred from the form and contents of the certificate and the terms of the statute and the form of the certificate as issued, and that the Government has always recognised the holders for the time being of the certificates as being persons entitled, ipso facto, by virtue of such holding, to the receipt of the monies which the Government has in fact from time to time proclaimed

(1) [1922] S. A. S. R. 95. (2) [1927] S. A. S. R. 1.
(3) [1924] A. C. 484.

under the certificate, no other money having in fact been paid in respect thereof. This course of dealing has continued for a sufficient time and in a sufficient number of cases to ripen into a commercial usage."

In these circumstances, for the purpose of determining the first point of law raised by the defence, it is of importance to consider the reasoning by which, in the former case of *Welden* v. *Smith* (1), this Board came to the conclusion that an original owner of wheat might enforce a liability for negligence against the Government of South Australia. This reasoning, as appearing in the judgment of the late Lord Chancellor, can be summarized as follows. First, the agreement signed by the owner involved an agreement or contractual obligation by the Government to receive, handle, and market his wheat, on his behalf, and to pay him a price dependent on the aggregate price for all the wheat handled and sold; secondly, this obligation implied a corresponding obligation on the part of the Government as mandatary to carry out their duties in a reasonable and prudent manner, having regard to the circumstances of the case; and thirdly, the Government should be regarded as the mandatary of all the owners and liable to each owner to deal carefully with the whole of the wheat. This last and most important link in the chain of reasoning is thus expressed in the judgment (2): "The Government, having undertaken to receive, handle, and market the wheat of all the owners concerned and to pay them a price dependent on the due handling and sale of all the wheat received, must be regarded as the mandatary of all the owners and bound by the ordinary obligation of reasonable care; and their Lordships see no reason why this obligation should not extend to the handling and marketing (including the storage) of all the wheat dealt with by the Government, so as to be enforceable by each owner interested in the total sales. Each owner who delivered his wheat to the Government for sale and signed the agreement thereby acquired an interest in all the wheat which was to be sold with his, and became entitled to have that wheat handled with reasonable care and prudence."

(1) [1924] A. C. 484. (2) [1924] A. C. 493.

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On the reasoning in this passage, it is clear that from the time of the signature of his agreement, the rights of each farmer or owner to have the whole mass or pool of wheat carefully handled and realized did not depend on, and were not measured by, the ownership of any wheat at all; for, as regards the whole of the rest of the mass or pool, he had never had any previous right or interest as owner, or otherwise. His whole original interest, as owner of his particular parcel, was converted into a fractional interest in the prospective proceeds of sale of the whole mass or pool of the wheat confided to the Government. This was obviously a completely new interest, and one as completely new in respect of his particular parcel of wheat as in respect of all the other parcels of wheat which, together with his, made up the total pool. Yet it was in respect of this new interest that it was held that the original owner might have a right of action against the Government for negligence resulting in a diminution of the price realized for the whole mass or pool of the wheat. And it would therefore appear that, although the delivery of a parcel of wheat no doubt formed the consideration for the contract in each case, the cause of action by each owner rested or depended not on any right of original ownership, but on the rights attaching to his new interest in the proceeds of the pool.

What, then, was the legal position when the original contracting owner cashed and receipted the Government certificate for the first advance of 2*s.* 6*d.* per bushel on his wheat, received his Government certificate for supplementary advances (which was the sole document of title representing his remaining interest in the transaction), and in the ordinary course of business transferred this certificate to a holder, whether purchaser or mortgagee? To answer this question it is important, in the first place, to examine the terms of the certificate itself.

On the face of this document there is a general heading, "South Australia Government certificate for supplementary advances on wheat, 1916–17 harvest." There is then a certificate that the owner, having delivered to the Government

a quantity of wheat, to be filled in according to facts in each case, and having received an advance of 2*s.* 6*d.* per bushel, is entitled to further advances as may from time to time be proclaimed payable. And there are provisions for showing on the face of the document certain allowances for possible "dockage" and for freight and handling charges that may have to be deducted from the second or third advance to become payable. On the back of the document there are four successive spaces for receipts or acknowledgments by the vendor or transferee in respect of payments to be made to him under the certificate. The sums to be inserted in the first three of these spaces are stated to be in respect of the second, third, and fourth advances per bushel (less a deduction from the second advance for dockage and from the third advance for freight and other charges); the sum to be inserted in the last of these spaces is stated to be for a "final payment per bushel." The precise words as to this final payment are as follows:—

	£	*s.*	*d.*
"Final payment of per bushel		—	
Received or credited to account of vendor or transferee of this certificate the sum of		—	"

Much stress was laid by counsel for the respondents on the fact that on the back of the document the further advances to which title is shown are only such as might from time to time be proclaimed payable; and it was insisted that a proclamation of a further or supplementary advance was a condition precedent to any claim for any further advance. However this may be as to any of the three advances on account provided for on the back of the document, the case appears to be quite different as regards the final payment ultimately provided for. As to mere interim payments on account, there seems nothing to prevent the Government from exercising a wide, and, indeed, almost unlimited, discretion within the bounds of good faith as to times and amounts. But the final payment is a very different matter, and one which is not indicated on the certificate as being, and indeed could hardly be, dependent on the discretion of

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the Government. This distinction is quite clearly marked by the form of agreement in the schedule to the Wheat Harvest (1915–16) Act, 1915, where the authority given by the owner to handle and sell " with periodical settlements as circumstances may permit," is immediately followed by an agreement " to accept final settlement at such time as the said Government is able to close accounts." And these last words occur in the agreement that was, in fact, signed by the owner when he received his first advance of 2*s.* 6*d.* per bushel. In these circumstances it cannot be doubted that the " final payment . . . . per bushel " which under the terms on the back of the Government certificates for supplementary advances is to be " received or credited to account of vendor or transferee of this certificate," represents the whole residue (after allowing for proper deductions and interim advances) of the share of the proceeds of sale of the pooled wheat which is attributable to the wheat specified in the certificate as having been delivered by the original owner.

This being so, when in the plain language of the certificate for supplementary advances the transferee and holder was substituted for the original owner as the person to receive all further interim advances and (the crucial point) the final payment in respect of his fractional interest in the proceeds of sale of the whole wheat, and when, as laid down in the last sentence of the passage quoted above from *Welden* v. *Smith* (1), the original owner by virtue of his acquisition of an interest in all the wheat " became entitled to have that wheat handled with reasonable care and prudence," it follows almost necessarily that the transferee and holder also acquired the right to complain of and sue for any diminution in his share of the proceeds of sale which was due to any negligence on the part of the mandatary, the Government. The original owner's right to sue for negligence (if any) was not one detached from his fractional interest in the total proceeds of sale, but a right incidental to that interest. Indeed, the respondents did not venture to argue that after the transfer of a certificate the original owner had retained

(1) [1924] A. C. 484, 493.

any right to sue. But unless this was so, the respondents' contention would involve the curious result that in the course of transfer of a certificate from the original owner to the new transferee and holder the amounts ultimately payable under the certificate were altered and lessened.

The true view of the matter is in their Lordships' opinion that presented by both learned counsel for the appellant—namely, that the original owner had the single definite right to have his contract carried out so that the proper fractional share of the total proceeds of sale should be handed to him; that incidental to this right to receive his share of the proceeds was a right to complain of their diminution by negligence; and that the transferee and holder of a certificate took the whole interest of the original owner in the proceeds, and also took as incidental to that interest the right to complain of their diminution.

In this view of the law the appellant, on proving negligence, will have a sustainable cause of action as the transferee and holder of each and every of the seven certificates specified in the third paragraph of the statement of claim; and it will not be necessary for him to rely with regard to the two certificates Nos. 3308 and 22,505 on the express assignments in writing from William Gum mentioned in para. 13 of the statement of claim. In these circumstances, their Lordships do not desire to express any opinion as to the effect of these assignments.

Their Lordships will humbly advise His Majesty that the order of February 17, 1928, be reversed and that the point of law raised by para. 1 of the defence be determined in favour of the appellant. The respondents will pay the appellant his costs here and below.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Sutton, Ommanney & Oliver.*

[PRIVY COUNCIL.]

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KINCH . . . . . APPELLANT;

AND

WALCOTT AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF COMMON PLEAS, BARBADOS.

Estoppel — Consent Order — Withdrawal of Charges — Subsequent Action — Plea of Estoppel—Reply that Consent induced by fraudulent Concealment.

An order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose.

A plaintiff in an action based upon charges which he has withdrawn by a consent order in a previous action between the parties is estopped by the order, and cannot effectively plead in reply that his consent was induced by fraudulent concealment:—

Quaere, whether a party to an action negotiating a consent order therein, by which the other party withdraws charges, is entitled to conceal his intention to prosecute the other party for perjury in an affidavit containing the charges.

Ainsworth v. *Wilding* [1896] 1 Ch. 673 approved.

Firm of R. M. K. R. M. v. *Firm of M. R. M. V. L.* [1926] A. C. 761, 771 followed.

Judgment of the Court of Common Pleas, Barbados, affirmed.

APPEAL (No. 48 of 1928) from two orders, dated respectively November 28, 1927, and December 2, 1927, made by the Court of Common Pleas, Barbados.

The appellant brought an action against the respondents claiming damages for conspiracy, basing his claim upon certain charges which he had withdrawn by a consent order made in settlement of an action for libel in which he was defendant and the first two respondents were plaintiffs. The respondents having pleaded that the appellant was estopped by the consent order, the appellant by an amended reply pleaded that his consent had been induced by concealment of the fact that the respondents, or one of them, intended to prosecute him for perjury in an affidavit in which he had made the same charges; he contended that

* *Present:* VISCOUNT SUMNER, LORD CARSON, and LORD BLANESBURGH.

thereby the consent order was avoided, or that the respondents were precluded from relying upon it.

The facts appear from the judgment of the Judicial Committee.

The question of estoppel was argued before Furness C.J. as a preliminary issue in the action. The learned Chief Justice held that the appellant was estopped by the consent order; in his view there was no obligation to disclose during the negotiation for the consent order the intention to prosecute the appellant for perjury.

1928. Dec. 3, 4. *Pritt K.C.* and *Merlin* for the appellant. There was no estoppel by record, because there was no adjudication by the Court and therefore no res judicata: *Jenkins* v. *Robertson* (1); *Bradshaw* v. *M'Mullan.* (2) The consent order merely recited the withdrawal of the charges; the Court did not order the appellant to do, or to refrain from doing, anything. It was proved that when the negotiation for the order took place there was a fixed determination to prosecute the appellant, whether he consented or not. The concealment of that fact was most material, and was fraudulent. The appellant was entitled to aver the fraud as nullifying the consent order; he was not bound to bring a separate proceeding to set it aside. The Court does not give effect to a judgment or order obtained by fraud: *Earl of Bandon* v. *Becher* (3); *Rogers* v. *Hadley* (4); *Gossain* v. *Gossain* (5); *Abouloff* v. *Oppenheimer.* (6) In *Ainsworth* v. *Wilding* (7) it was held merely that a consent order could not be set aside on motion on the ground of a mistake by one of the parties; no fraud was in question. For reasons already given the consent order could operate only as an estoppel in pais. No representation can be relied upon as an estoppel in pais if it has been induced by concealment of a material fact, whether fraudulent or not: *George Whitechurch, Ld.* v. *Cavanagh* (8); *Porter* v. *Moore.* (9) A compromise

(1) (1867) L. R. 1 Sc. App. 117.
(2) [1920] 2 I. R. 412, 424.
(3) (1835) 3 Cl. & F. 479.
(4) (1863) 32 L. J. (Ex.) 241, 248; 2 H. & C. 227.
(5) (1859) 8 W. R. 196.
(6) (1882) 10 Q. B. D. 295, 306.
(7) [1896] 1 Ch. 673.
(8) [1902] A. C. 117, 145.
(9) [1904] 2 Ch. 367, 373.

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is not binding in equity if one party to it has concealed a material fact: Kerr on Fraud and Mistake, 5th ed., p. 109. A withdrawal of an allegation by a defendant in a libel action does not preclude him from asserting its truth in a subsequent action: *R.* v. *S.* (1)

Farwell K.C. and *Blanco White* for the respondent. A judgment or order by consent, equally with a judgment or order not by consent, raises an estoppel in a subsequent suit between the parties, and can be set aside only in proceedings constituted for the purpose: *Huddersfield Banking Co.* v. *Henry Lister & Son, Ld.* (2); *In re South American and Mexican Co.* (3); *Wilding* v. *Sanderson* (4); *Ainsworth* v. *Wilding.* (5) The observations of Romer J. in the case last cited were expressly approved by the Board in *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.* (6)

[They were stopped.]

Pritt K.C. replied. In *Ainsworth* v. *Wilding* (5) it was not contended that the consent order could be more than an estoppel in pais.

1929. March 19. The judgment of their Lordships was delivered by

LORD BLANESBURGH. Before proceeding to define with particularity the issue which on this appeal their Lordships must determine, it may be well for clearness sake to set forth, as succinctly as possible, the somewhat involved story which leads up to it. All the parties live in Barbados. The appellant is a merchant there, the respondent Walcott a barrister-at-law, and the respondent Hutchinson a solicitor, both practising in the island. The respondent Taylor is a commercial agent, who was for some time in the employment of the appellant.

For many years before 1925 the appellant had acted as agent on commission for a Newfoundland firm of Monroe & Co., and in later years for that firm's successors in business,

(1) 1914 S. C. 193.
(2) [1895] 2 Ch. 273, 280.
(3) [1895] 1 Ch. 37.
(4) [1897] 2 Ch. 534, 544.
(5) [1896] 1 Ch. 673, 676.
(6) [1926] A. C. 761, 771.

the Monroe Export Co., Ld. The appellant's agency was concerned mainly with the sale on commission of fish consigned by the Monroes to him in Barbados, and with the purchase in the island, also on commission, of molasses on their account. In 1925 disputes arose between the Monroe company and the appellant with reference to his transactions, and in March, 1925, the company instituted against him in the Barbados Chancery Court a suit claiming full accounts on allegations (inter alia) that profits had been improperly withheld from the company in connection with his purchases of molasses, and that the appellant was suppressing his books in which his transactions on behalf of the company were recorded. In that suit, to be referred to as the suit for accounts, the respondent Walcott acted as counsel, and the respondent Hutchinson as solicitor for the company, the appellant being duly represented by counsel and solicitors of his own. In the result on June 5, 1925, after a long trial, a decree in the suit adverse to the appellant was pronounced by the acting Vice-Chancellor, who directed the accounts of the appellant's transactions to be reopened, and ordered him to make payment together with the costs of suit of the amount found due on these reopened accounts when taken. A stay of execution was, however, upon terms granted to enable the appellant, if so advised, to appeal.

Thereupon, indeed, within a few days, negotiations were on foot for a settlement. These were conducted by the respondents Walcott and Hutchinson on behalf of the company with the appellant direct, that is to say, without the intervention of any legal advisers on his behalf. As a result of them a deed prepared by the respondent Hutchinson was on June 18, 1925, executed by the appellant. It bore that he had settled the company's claims against him on all accounts by a payment in British currency of $15,000 thereby acknowledged to have been received, and by a mortgage thereby made of specified properties of his own to secure an additional sum the equivalent of $25,000 with interest. All further proceedings in the suit for accounts were to be discontinued.

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This deed contained recitals which apparently the respondent Hutchinson now argues were not in complete accord even with his own intent at the time, and were less favourable to the appellant than they should have been. But the complaints of the appellant with reference to the transaction went far beyond any such matters of detail, and as ventilated by him in correspondence and in legal proceedings, to which reference must later be made, were that he was left to act in the matter without legal advice; that so far as the deed was a mortgage deed he executed it without understanding and indeed being misinformed as to its nature, and that his execution of a deed at all was in effect the result of the pressure of the respondents Walcott and Hutchinson, who threatened that, if he did not pay the $15,000 and execute the deed as presented to him, criminal proceedings would be taken for alleged misdeeds in relation to his purchases of molasses as agent for the company.

Nor did the appellant keep to himself these charges of his against these respondents. In two letters, one of August 2, 1925, and the other of August 19, 1925, addressed to Mr. Monroe, the managing director of the Monroe company, he asserted in substance that it was as a result of blackmail on their part that he had been coerced to put up what he described as the guarantee. These letters with their grave charges against them of personal and professional misconduct having come to the knowledge of Mr. Walcott and Mr. Hutchinson they, on June 8, 1926, joined as plaintiffs in an action for libel against the appellant. In it they each claimed $5000 damages. On June 29, 1926, the appellant put in his defence. He pleaded justification in terms which included his allegations already referred to, and on the next day, June 30, he followed this up by commencing in the Chancery Court of the island a suit against the Monroe company—to be referred to as the rescission suit—claiming that the settlement and mortgage deed of June 18, 1925, should be set aside by reason (inter alia) of the matters pleaded by him in his plea of justification. On the same day he made an affidavit in the rescission suit in support

apparently of an application to restrain a threatened sale of his property mortgaged to the Monroe company by the deed he was therein seeking to impeach. In that affidavit he repeated in effect in relation to the settlement his allegations against the two respondents to which reference has already been made.

The respondent Hutchinson deeply resented these sworn imputations upon his personal and professional conduct, and it is now his own avowal that he thereupon resolved and remained determined to institute against the appellant, at the earliest convenient opportunity, a prosecution for perjury for having made them. His intentions in that matter however he, it is asserted, kept to himself, more particularly during the negotiations for the settlement of the libel action and the rescission suit which was reached by consent orders made in each on November 16, 1926, and the provisions of which are, on this appeal, all important.

The terms of the consent order in the libel action were that upon the appellant by his counsel withdrawing all allegations of fraud and duress pleaded in his defence and upon his expressing regret at having pleaded justification and withdrawing the plea, and upon the respondents Walcott and Hutchinson undertaking not to bring any fresh action in respect of the subject-matter of that action, it was by consent ordered that the respondents should be at liberty to discontinue the action, and that the appellant should pay them the sum agreed on by counsel for their costs of suit. In the consent order in the rescission suit the appellant by his counsel unreservedly withdrew all charges of fraud, malpractice and duress against the respondents Hutchinson and Walcott contained in the bill of complaint and affidavits therein, the company, on the other hand, stating that it made no charge in that suit against the appellant of having suppressed the books of account in the pleadings mentioned. For the rest, the settlement of June 18, 1925, was in effect set aside ; the properties thereby mortgaged to the company were to be reconveyed to the appellant at his expense ; the accounts were to be taken as directed by the judgment of June 5, 1925,

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these accounts being extended so far as molasses were concerned, the appellant was to pay the company's taxed costs of the suit for accounts, but each party was to bear his own costs of the rescission suit.

As will appear presently, these consent orders lie at the root of the questions at issue upon this appeal, and it is convenient now to state with reference to them that there is, in their Lordships' view, no room for doubt that an underlying condition of the negotiations for the settlement of the libel action and of the rescission suit, as also of the final arrangement for the settlement of both, was that the action and suit should be settled at the same time. The settlement of one was dependent upon the settlement of the other, and the consent orders, although separate, must stand or fall together. The consent order in the rescission suit has, it appears, been acted upon by the Monroe company, and the appellant has obtained advantages under it which, so far as their Lordships have been informed, he has never disaffirmed. The importance of all this in its relation to the ultimate question before the Board will presently become apparent.

The third respondent Taylor now takes and thereafter retains a prominent place in the narrative. That respondent, as has already been said, was at one time in the employment of the appellant. There had been grave differences between them. Taylor had been prosecuted by the appellant for embezzling his moneys. He was a witness for the Monroe company in the suit for accounts, and it has been an allegation of the appellant that Taylor was paid 1200*l.* for so giving evidence against him, and that so far from the appellant having suppressed or concealed his books of account as there alleged, these books were at all material times in the possession or under the control of the respondents Hutchinson and Taylor themselves. Imputations upon Taylor were clearly not accepted by the learned Vice-Chancellor in the suit for accounts, and the adverse decree against the appellant in that suit must have encouraged Taylor to proceed against the appellant in respect of a letter of October 29, 1924, addressed by him to the same Mr. Monroe above referred

to, in which he alluded to Taylor as the vagabond who had stolen his cash books to save himself before the Courts. Taylor, it seems, had even during the pendency of the suit for accounts instructed the respondents Walcott and Hutchinson to commence on his behalf at some suitable time an action against the appellant for libel in respect of that statement, and the appellant's complaint against all three is—and it is the complaint on which the present action is based—that the respondents Walcott and Hutchinson when negotiating with him for the settlement of the suit for accounts on June 18, 1925, intimated that no such settlement was possible unless the appellant would also agree to pay to the respondents Walcott and Hutchinson on the respondent Taylor's behalf the sum of 1200*l.* by way of compromise of Taylor's cause of action in respect of the appellant's defamatory letter to Mr. Monroe. That sum the appellant did pay, and the present action, which was commenced on March 31, 1927, has been brought to recover damages from the three respondents in respect of the obtaining from him of that 1200*l.*, the appellant setting up against the three the allegations which he had already made and withdrawn against the respondents Walcott and Hutchinson separately in relation to the settlement of the suit for accounts—namely, that they had all wrongfully conspired to extort that money from him by means of threats to institute against him the criminal proceedings already mentioned.

The pleadings in the action are voluminous. It suffices, however, in the events which have happened, to set forth only the following paragraphs of the statement of claim:—

"(3.) Some time between the 5th and 19th days of June, 1925, the defendants wrongfully and unlawfully conspired together to extort money from the plaintiff.

"(4.) In pursuance of the said conspiracy the defendants said and did the following acts and things: (*a*) The defendants Hutchinson and Walcott threatened to cause the plaintiff to be prosecuted for a criminal offence or offences alleged by them to have been committed by him arising out

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of the purchase of molasses by the plaintiff as agent for the Monroe Export Co., Ld., of St. John's, Newfoundland, and the shipments by him of such molasses to the said company unless he the plaintiff paid to them the said Hutchinson and the said Walcott, the legal advisers of the defendant Taylor, the sum of one thousand five hundred pounds sterling in compromise of an alleged cause of action which the defendant Taylor had against the plaintiff for libel in respect of a letter written by the plaintiff to the said Monroe Export Co., Ld., and/or W. S. Monroe a director of the said Company and/or slander.

"PARTICULARS.

"*For some time prior to June* 18, 1925, *the defendants Walcott and Hutchinson had threatened to prosecute the plaintiff for the alleged criminal offence or offences mentioned unless he compromised a then pending suit of the said Monroe Export Co., Ld., against himself.*

"*On the said June* 18, 1925, *it was definitely agreed between the plaintiff and the defendants Walcott and Hutchinson that the defendants Walcott and Hutchinson would abstain from prosecuting the plaintiff on certain terms then agreed between them, which included the payment by the plaintiff to the defendant Hutchinson of* $15,000 *on June* 19, 1925."

By their defences the respondents denied the allegations of conspiracy, and asserted—and so much is now admitted—that the matters referred to in the above italicized paragraphs of particulars were included among the allegations expressed to be withdrawn in the two consent orders already mentioned. Accordingly the respondents Walcott and Hutchinson pleaded and contended that by reason of these consent orders the appellant is in this action precluded as against them from raising the matters so withdrawn; and all the effective proceedings in the action have so far been concerned with this plea alone.

On July 6, 1927, the cause came on for trial before the Chief Justice of Barbados and a special jury. The point just mentioned was at once taken by counsel on behalf of the respondents Walcott and Hutchinson, and after full argument

was on July 8, 1927, upheld as a preliminary finding by the learned Chief Justice. Against his order to that effect the appellant appealed to the West Indian Court of Appeal, and on September 8 by consent the appeal was remitted to the Chief Justice to determine whether the appellant was or was not on any grounds estopped or precluded from alleging or proving the allegations withdrawn by him in the consent order in the libel action, the appellant being at liberty to apply to amend his reply so as to raise to the plea of estoppel an answer of fraud and nondisclosure. By the same order the appellant undertook to discontinue his action against all the respondents and not to bring any fresh action against any of them in respect of the matters alleged therein should any appeal by him from the decision on the matter thereby remitted be unsuccessful in the West Indian Court of Appeal and/or before the Judicial Committee of the Privy Council. This undertaking is now invested with a decisive significance. Its effect is that the appellant's whole action now depends upon the result of this appeal, although that appeal has direct reference only to a preliminary finding in the cause.

In pursuance of leave reserved by the order of the West Indian Court of Appeal the appellant in an amended reply pleaded that the consent orders were obtained by the respondents Walcott and Hutchinson by their fraudulent concealment from or omission to disclose to him the fixed and unalterable determination of the respondent Hutchinson to prosecute the appellant for perjury committed in his affidavit already mentioned. In a rejoinder these two respondents asserted that neither of them was under a legal obligation to disclose such determination to the appellant, and further that the appellant or his agent Mr. Hamel Wells, barrister-at-law, was at all material times aware of it.

On these amended pleadings the case as so remitted by the Appeal Court came before the Chief Justice of Barbados on November 28, 1927. He then ordered that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to the evidence being heard on the merits of the case. This is the first order now

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appealed against. The argument on estoppel then proceeded, and in the result the learned Chief Justice held that the respondents Walcott and Hutchinson were under no duty to communicate to the appellant the determination which had been arrived at that he should be prosecuted for perjury, and on the main question whether the appellant was precluded from alleging or proving the allegations withdrawn in the consent order in the libel action the learned judge adhered to his previous decision of July 8, 1927. By his order of December 2, 1927, he declared accordingly. This is the second order against which the appellant now appeals to His Majesty in Council.

As to the first of these orders appealed from their Lordships entertain no doubt that the learned Chief Justice was well warranted in directing that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to evidence being heard on the merits of the case—should be tried, that is to say, as a preliminary issue. So soon as the terms of the order of the Appeal Court of September 8, 1927, are looked at, no other course, as it seems to the Board, was open to the learned judge. That order was a consent order. The question of estoppel had been brought before the Court on an appeal from an order made on a preliminary issue. It is the same preliminary issue albeit on an extended basis that is referred back to the Court of Common Pleas for further consideration. So much clearly appears from the terms of the undertaking embodied in the order and already referred to. It is true that no evidence was heard by the learned Chief Justice on the new allegations of fact made by the respondents Walcott and Hutchinson in their new rejoinder, and directly relevant to their plea of estoppel. But it is not to the appellant's disadvantage that in the absence of evidence in support of these allegations, his assertion that he remained in ignorance of the respondent Hutchinson's determination to prosecute him for perjury was, by the learned Chief Justice, and must now on this appeal, be accepted as correct. In short, no ground whatever has in their Lordships' judgment been shown for interfering with the order of November 28, 1927.

The second order appealed from is that of December 2, 1927, against the decision of the Chief Justice that the respondents Walcott and Hutchinson had effectively raised an estoppel against the appellant. Their Lordships heard from learned counsel for him an elaborate and able argument which canvassed, in its course, many difficult questions of general interest and importance. Their Lordships, however, do not find it necessary on the present occasion to go into these questions. In the last analysis of the real position the appeal from this second order of the learned Chief Justice can, as they think, be determined by reference to considerations of great simplicity.

First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne J. in *Wilding* v. *Sanderson* (1), "must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose." In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal. The consent order in the libel action has neither been abandoned nor set aside. Accordingly it stands at this moment as an order effective to prevent the appellant from setting up against the two respondents parties to it the charges against them thereby withdrawn. Nor is it any answer for the appellant to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity. It is, first of all, in

(1) [1897] 2 Ch. 534, 544.

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no sense true that the order is a nullity. At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant, can only be so set aside in an action or proceeding directed to that special end. The decision of Romer J. in *Ainsworth* v. *Wilding* (1) in that sense seems to their Lordships to be not only in accordance with principle but alone consistent with convenient practice, and their Lordships note that it has been accepted and followed by this Board in *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.* (2) But there is a further and special reason why in the present case the requirements of that decision should be insisted upon. As has already been pointed out the consent orders in the rescission suit and libel action were intended to stand or fall together. Even if it were possible for the appellant to stand by the order in the suit while repudiating the order in the action it is clear that he cannot take that course except in some proceeding to which the Monroe company is either party or privy, and that company is in no sense at all either party or privy to these proceedings.

On this short ground therefore their Lordships are of opinion that the order of December 2, 1927, should be upheld. In the view they take of the position it is not open to them in these proceedings and in any case it is unnecessary for them to decide, and they withhold any opinion, upon the question whether the respondent Hutchinson during the negotiations for the consent orders was entitled to keep to himself his fixed determination to prosecute the appellant for perjury. And if they refrain from going further into that question their action is in no way attributable to any failure on their part to appreciate its importance. The slightest hint that such a prosecution was in reserve might well have deterred the appellant, ignorant of the fact, from making even a formal withdrawal of his sworn charges, and that danger cannot

(1) [1896] 1 Ch. 673. (2) [1926] A. C. 761, 771.

well have been absent from Mr. Hutchinson's mind, seeing that the withdrawal made is only consequential on the undertaking not to bring any fresh action in respect of these charges. When to all that is added the fact that this withdrawal must seriously and might fatally embarrass the appellant in his answer to a charge of perjury when brought, this question of concealment, it is seen, involves considerations of wide importance to the legal profession as a whole. It is, however, a question which, owing to the high standard of honour prevailing in the profession, rarely arises in practice. Moreover, in the present case the consequences for the appellant have not been so serious as they might have been. For, when the prosecution was at length launched by Mr. Hutchinson, the grand jury, after hearing the evidence both of himself and Mr. Walcott, threw out the bill. Accordingly, while in no way intimating disagreement with the Chief Justice in the conclusion which he reached on this subject, their Lordships prefer, so far as any observations of theirs might affect it, to leave this question, as applied to a case so extreme as the present, entirely open.

For the reasons already given they are of opinion that this appeal fails. They will accordingly humbly advise His Majesty that it be dismissed and with costs.

Solicitors for appellant: *Markby, Stewart & Wadesons.*

Solicitors for first and second respondents: *Minet, May & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1929 March 7.

FRANCE . . . . . APPELLANT;

AND

JAMES COOMBES AND COMPANY . . RESPONDENTS.

Master and Servant—Wages—Minimum Wage—Trade Board—Boot and Shoe Repairing Trade—Working Manager employed on Work of specific Trade and also on other Work—Presence on Employer's Premises during all working Time—Calculation of Wages—Trade Boards Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 32), *s.* 8—*Trade Boards* (*Boot and Shoe Repairing*) *Order*, 1919—*Boot and Shoe Repairing Trade Order of August* 8, 1922.

By the Trade Boards (Boot and Shoe Repairing) Order, 1919, made by the Minister of Labour, the Trade Boards Acts, 1909 and 1918, were applied to the boot and shoe repairing trade, and in due course the trade board established for the trade fixed minimum rates of wages for managers and other classes of workers in the trade, and these rates were confirmed by the Minister of Labour by an Order of August 8, 1922.

The appellant was engaged as the working manager of a branch boot and shoe repairing shop belonging to the respondents. By the terms of his agreement, in addition to boot and shoe repairing, he had to sell bootlaces and other sundries, to sweep and clean the shop, to dress the windows, to keep accounts of the takings, and to keep the shop open and be in attendance during business hours. He was actually engaged in repairing boots and shoes for rather less than half the time during which he was present at the shop:—

Held (by Lord Buckmaster, Viscount Dunedin, Viscount Sumner, and Lord Warrington of Clyffe; Lord Blanesburgh dissenting), that in calculating the wages to which he was entitled, the appellant was not to be deemed to have been employed in boot and shoe repairing "during all the time during which he was present" at the respondents' shop, within s. 8 of the Trade Boards Act, 1918, because during part of that time he was "so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform."

Decision of the Court of Appeal [1928] 2 K. B. 81 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of MacKinnon J. (2)

The appellant brought an action against the respondents for 363*l.* 10*s.* 6*d.*, the balance of wages alleged to be due to him from the respondents in accordance with the Trade

* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

(1) [1928] 2 K. B. 81. (2) [1928] 1 K. B. 457.

Boards Acts, 1909 and 1918, in respect of his employment by them as manager of a boot and shoe repairing shop in Manchester.

The substantial question for determination was whether the appellant was entitled to recover wages at the minimum rates fixed by the trade board established for the boot and shoe repairing trade in Great Britain during the whole time that he was employed in the shop or only during the time when he was actually engaged at the bench in the physical operation of repairing boots and shoes.

On the latter hypothesis it was admitted that the appellant had been paid all that was due to him.

MacKinnon J. held that the respondents had proved that the appellant, except whilst repairing boot and shoes, was present on the premises for a purpose unconnected with that work and for a purpose other than that of merely waiting for work to be given to him to perform, within the meaning of s. 8 of the Trade Boards Act, 1918, and he therefore gave judgment for the respondents. The Court of Appeal (Scrutton and Sankey L.JJ. and Romer J.) took the same view and dismissed the appeal.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of Viscount Dunedin, and they are summarized in the headnote.

1929. Feb. 4, 5. *Schiller K.C.* and *Hilbery K.C.* for the appellant. The appellant was a working manager in the boot and shoe repairing trade within the definition of a foreman or manager in s. III. of Part IV. of Sch. I. of the Boot and Shoe Repairing Trade Order of August 8, 1922, during the whole time when he was present in the shop, and as such was entitled to wages at a minimum rate of 80*s.* arrived at on a basis of a forty-eight hour week: ss. VII. and VIII. of Part I. of the Schedule. To be a manager it is not necessary that a man should do journeyman's work. The Trade Boards Acts apply to managers who do manual work and to those whose duty is merely to supervise. The appellant was

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employed under a single and indivisible contract, and all the duties which he was bound to perform were in fact boot and shoe repairing work. The Court of Appeal was wrong in saying that the appellant was not for all purposes a manager, and that all he could ask for was a minimum rate of wages while he was actually engaged in repairing boots and shoes. The nature of the appellant's employment as working manager in the boot and shoe repairing trade is not altered by the circumstance that his contract of service included certain duties which were not specially connected with boot and shoe repairing. Under s. 8 of the Trade Boards Act, 1918, the appellant must be deemed to have been employed during the whole time he was present on the respondents' premises, unless the respondents can show that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform. The respondents have failed to discharge that onus.

Stuart Bevan K.C. and *Sir Robert Aske* for the respondents. The appellant was paid at the minimum rate fixed by the Orders for all work done in the scheduled trade. He was employed to perform all the work specified in the agreement of service, and of that work boot and shoe repairing occupied less than half his working time. The respondents have proved that, except when engaged in boot and shoe repairing, the appellant was present on their premises " for some purpose unconnected with his work " (which refers only to work for which a minimum rate of wages is fixed under the Trade Boards Acts) " and other than that of waiting for work to be given to him to perform " within s. 8 of the Act of 1918, and there are concurrent findings of fact to that effect.

Schiller K.C. replied.

The House took time for consideration.

March 7. LORD BUCKMASTER. My Lords, I beg to say that I have had the opportunity of reading the judgment of my Lord Dunedin. With it I agree and to it I have nothing to add.

VISCOUNT DUNEDIN. My Lords, the appellant is in the service of the respondents, who are the proprietors of various boot and shoe repairing shops. Their relations are regulated by an agreement which settled the terms of the employment and the salary to be paid. For the purpose of this case it is not necessary to set forth the agreement in full. It is sufficient if its provisions are summarized.

The appellant was engaged as working manager of a branch shop. He was single-handed except in times of unusual stress. His duties consisted in doing any boot repairing which customers required, which was the business for which the shop existed. He also had to sell certain small articles such as bootlaces, etc., known as sundries. He had to sweep and clean the shop, dress the window, keep a note of the time he was occupied in repairing work, keep accounts of all takings, hand over the cash weekly and shut the shop at nights. He lived elsewhere. On the other hand, the employer was bound to pay a fixed wage, plus a commission, when the weekly takings extended beyond a certain figure. On an average he was in the shop sixty-three hours in a week, of which he was twenty-five hours on the bench working at repairing work and thirty-nine not on it. The appellant was regularly paid his wages as settled by the agreement. He conceived, however, that under the Trade Boards Act, 1918, he was entitled to a further sum, and he raised the present action for the sum due to him for the period from December 11, 1922, to November 28, 1925. The argument on which his claim is based is as follows: He says that the Trade Boards Act applies to his whole employment; that he was a foreman or manager in terms of the definition contained in the Act and that he was, therefore, entitled to payment of, first, a week of forty-eight hours at the scale in the schedule applicable to managers, and, second, to overtime for all hours over the forty-eight which he spent in the shop. The action was dismissed by the trial judge and on appeal by the Court of Appeal.

I shall first consider the terms of the Order which made the Trade Boards Act apply to the appellant's trade. The

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scheme of the Trade Boards Act is that it may be made to apply to trades other than those originally specified by an Order promulgated by the Minister of Labour. On April 18, 1919, such an Order was issued, and by art. 1 thereof it provided that the Trade Boards Acts should apply to the "Trade specified in the appendix to this Order." The appendix is as follows: "*Trade.* The boot and shoe repairing trade, that is to say, the repairing wherever carried on of boots, shoes, slippers and all kinds of leather foot wear, including the making of bespoke hand-sewn, rivetted or pegged leather foot wear, but excluding the manufacture of leather foot wear on a large scale, the repairing of saddlery and leather goods other than leather foot wear and the retailing of leather foot wear."

It has been held by the Courts below and is, I think, quite clear that this applies only to the trade proper. The laboured exclusion of any sort of work which might conceivably be considered as connected with boot repairing absolutely excludes the idea of general work falling within the Order. In the appellant's case, therefore, it clearly excludes what I may call multifarious employment. It is to the trade only of boot and shoe repairing and to the persons engaged therein that it applies.

Now the appellant, in so far as he worked at the bench, was undoubtedly engaged in the boot and shoe repairing trade. He says he was a foreman or manager. To test that one goes to the statutory Order of the Minister of Labour promulgated under the powers of the said Act. Now that says: "A foreman or manager is a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and . . . .

(*b*) Who (whether working alone or with any other worker), under the terms of his employment, in addition to any work which may be required of him as a journeyman, fits up or supervises the fitting up of the work and has control of the repairing or making and the technical direction thereof."

From this it is plain that the appellant was a foreman or manager but only in so far as he was a worker in the boot

and shoe repairing trade, not in so far as he was doing what I have called multifarious work.

The appellant, however, falls back on another argument. He says that although he may be only a foreman in respect of the actual repairing work, yet in terms of s. 8 of the Act of 1918, he was so employed during the whole time that he was in the shop. Sect. 8 is as follows: "For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum amount of wages has been fixed under the principal Act, the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves that he was so present without the employer's consent express or implied, or that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform . . . ."

Two questions arise on this section. First, on the words "unconnected with his work." What is his work? Here again I take it that it is clear that it means the work in the trade proper, not multifarious work. It follows that in my view the respondents have proved that he was present, during the time that he was on the premises but not on the bench, for a purpose unconnected with his work, to wit, for the purpose of performing his multifarious duties. Second, "other than that of waiting for work to be given to him to perform." Here again the same criterion applies. Work means the repairing work, not the taking in of orders from outside customers. As he was by himself he was obviously not waiting for work to perform in the sense of waiting for fitting up, providing with leather, etc., at the bench. Accordingly, in my view, the respondents have proved the exception, and all that the appellant can claim is to be paid at the rates fixed by the statute for the hours he spent at the bench. Now it is admitted that the payments under the agreement are such as exceed payments under the statute so calculated, and so his case fails. I move that the appeal be dismissed with costs.

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LORD BLANESBURGH (read by LORD ATKIN). My Lords, I propose for the moment to refrain from any comment on the judgments delivered in this case in the Courts below. I do so because the questions between the parties depend, as I think, upon considerations anterior to and displacing those by which these judgments are governed. A reference to two sections of the Trade Boards Act, 1909, will conveniently introduce what I conceive to be the real issue at stake on this appeal.

Sect. 6 of that Act imposes upon an employer penalties for not paying wages in accordance with obligatory minimum rates. It provides that on any prosecution under the section it shall lie on the employer to prove by the production of proper wages sheets or other records of wages or otherwise that he has not paid or agreed to pay wages at less than the minimum rate, and s. 15 empowers the inspecting officer to require production of these wage sheets or other records. The daily wage sheet and the so-called weekly balance sheet in the forms which the appellant here was required to make out and periodically forward to the respondents, contained details to be used if necessary, as MacKinnon J. concluded, under these sections. From this point of view they disclose very clearly the respondents' conception of their statutory obligations to the appellant. Indeed, it is in these forms alone that I find even a remote allusion to these obligations. In what the appellant, not without a certain grim humour, described in his evidence as "Mr. Coombes' Act," allusion to them there is none. In each daily wage sheet is shown the actual piece work done by the appellant during that day with the minimum statutory piece rate then operative set against each item. The weekly balance sheet in turn embodies the results in this regard of the week's daily sheets, and shows the minimum wage for the week earned by the appellant in respect of his piece work actually done. This wage was not, however, a wage to be paid. It had no place in the balance sheet for any presently effective purpose. In another column appears the wage calculated in terms of his agreement

actually retained in that week by the appellant. This, in the sheet produced to the House, and doubtless invariably, was a larger sum than the minimum appearing to have been earned by him. The conclusion deducible from the balance sheet is that the appellant's statutory employment, if I may so describe it, was on boot repairing piece work only; and that in respect of all such work done by him he was receiving, albeit on another account, not the bare wage but something in excess of the minimum wage which the respondents were by statute required to pay him.

But the balance sheet, while it records the receipt by the appellant of his conventional wage, makes no reference to the number of hours spent by him in the respondents' service in return for which the conventional wage was actually paid. If it is by reference to these hours, and not to the minimum rates for his piece work, that the appellant's statutory right to remuneration is to be assessed, then his conventional wage which was all he received is far below any statutory minimum. Accordingly, as I see it, the question to be determined is whether, as applied to the actual character and quality of the appellant's employment under his agreement, the Trade Boards Acts and the appropriate minimum wage rate in the Boot and Shoe Repairing Trade Order in force thereunder did not require the respondents to pay to him on that time basis the minimum wage applicable to his position in their service.

My Lords, in the very remarkable form of agreement, "Mr. Coombes' Act," which apparently the respondents exact from each of their branch managers, there are to be found certain provisions of extreme, perhaps of decisive significance in the determination of that question. I select these for definite mention in the following statement of the actual agreement with the appellant because they are in no way dealt with in the judgments appealed from. Under that agreement the appellant was employed as working manager at the branch shop of the respondents (described in the agreement as the employer) at 1160 Ashton Old Road, Openshaw, or at such other branch shop elsewhere of the

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employer to which the appellant might be transferred. The appellant agreed (clause 2A) to do all kinds of boot repairing and other work required by the employer and to devote the whole of his time, ability and attention to the employer's business. He agreed (2H) to keep open the branch shop and remain in attendance thereat during business hours. These were from 8 A.M. to 7.30 P.M. except on Fridays when they were from 8 A.M. to 8 P.M. and Saturdays when they were from 8 A.M. to 1 P.M. The working hours, that is to say, were sixty-three hours a week. The appellant further agreed (2K) not to be engaged directly or indirectly in any other business during the continuance of his employment, and the agreement concludes with a clause precluding the appellant for a period of one year after leaving the respondents' service from being interested engaged employed or concerned in any boot repairing business within limits of distance the extensive range of which I do not pause to criticize.

Paraphrased these provisions of his agreement show that for the whole sixty-three hours of each week the appellant was bound to remain continuously upon and in charge of the respondents' boot repairing premises: he was bound himself to do for them all repairing work required during that time: and he was precluded over the whole term of his employment from doing any boot repairing work whatever either for himself or for any other employer. For all this he received a wage which had no reference to the amount of boot repairing that might actually be done by him and was far short of any minimum wage on a time basis; while after leaving this weekly employment he was for a year placed under a restrictive covenant of which, in the interests of the respondents, the less said the better. The appellant's employment as manager was not, be it noted, either expressed to be, nor was it in fact an employment for the time of actual working at boot repairing, with other work provided for him during the rest of his working day. Under his agreement the appellant got no employment at all as a boot repairing manager except upon the terms that he remained ready to

devote to that purpose if so required by the respondents the whole of his working week.

The nature of the appellant's actual working day is described by the learned judge. Approximately half of his time was normally taken up in actual boot repairing work: his keeping of books was in substance represented by the preparation of the daily wage sheets and the weekly balance sheets: the sale of sundries was quite negligible: the sweeping of the small room where the work was done and the cleaning of its single window must have absorbed little of his leisure. Indeed normally for half the day the appellant had only to stand and wait. But by so doing he served. The duty of continuous unbroken attendance was obviously imposed upon him by the respondents that he might be the person always on the spot to receive orders for boot repairing, as they came in: to arrange prices and details of the work to be done and to hand out the finished work when called for. Without some such constant intelligent attendance and without such attendance preferably by a skilled boot repairer the business of the respondents at this branch shop could not have continued for a week.

I asked Mr. Stuart Bevan whether he could under the Acts and Order justify an agreement by virtue of which, with no obligation on his part to pay a minimum wage on a time basis, an employer could, if he had need of them, retain the worker's protected services exclusively for himself, and could, if he had himself no need of these services, prevent the worker from exercising his protected skill either for his own benefit or in the service of another employer. Mr. Bevan's answer, as I understood him, was that provided the worker received the equivalent of the minimum wage in respect of repairing work actually done by him, all the other provisions of any agreement with him were matters of bargain outside the Acts altogether. The remedy of the worker if he found these provisions irksome or oppressive was to terminate the agreement.

My Lords, seeing that the presumed necessity for fixing any minimum wage rate at all in any particular trade is due

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to the apprehension on the part of the Minister that in its absence workmen in that trade may have imposed upon them wages which they ought not to be asked to accept, but which, either as a result of competition in the labour market or deficient bargaining power, they are not in a position to refuse, this answer of Mr. Bevan's may not, I think, be accepted as correct or adequate without very full consideration. If it be well founded it at once removes out of the way every obstacle to the wholesale evasion of these protective Acts. I proceed therefore to test its correctness by a consideration of the relevant provisions of the Acts and of the Boot and Shoe Repairing Trade Order with which your Lordships are now immediately concerned.

My Lords, in common with, I think, many similar enactments, these Acts do not require that any Order made under them shall bind the employer to find for his workers in general, if the worker is paid by the piece, work of any prescribed amount, or if he is paid on a time basis, work for any prescribed time. What is required of the employer is that the worker shall receive at least the minimum rate of remuneration for the work actually done, or for the time spent in the statutory employment. And this is in terms so provided for by s. VIII. of Part I. of Sch. I. of this Order.

But this immunity of the employer carries with it a collateral right in the worker. During the periods when the employer is not bound either to employ or pay him he must be left at liberty either to obtain his minimum wage from another employer, or to exercise his skill for his own benefit. In no other way can the minimum or subsistence wage which for workers of his trade the Acts essay to provide be found for him. Accordingly, where an employer, as the respondents here did, binds a worker, in this instance, the appellant, to be in continuous attendance at his premises ready, if called upon, to undertake his boot repairing as and when required, and where by the same agreement the worker is required to do no boot repairing for any one else I should myself, if necessary, be prepared to hold that such an agreement unless specially permitted by the Order itself would be void under

the Acts, unless for the whole time of his service there was payable to the worker a wage at the minimum time-rate. And even as applied to journeymen workers I would in no way be diverted from this conclusion by the provisions of s. 8 of the Trade Boards Act, 1918, however narrowly these provisions be construed. For that section, as it seems to me, and I refer to it now only for the purpose of indicating this aspect of it, presupposes that the worker there referred to remains at liberty during the intervals specified to be absent from the premises of the employer if he so desires. The section has, I think, no application to cases where continuous presence of the worker upon the premises is by his contract required of him.

But, my Lords, it is not necessary in the present case and for the purpose of deciding it in favour of the appellant to determine definitely whether such would be the position of an ordinary worker in this trade under an agreement like the appellant's. The appellant was not an ordinary worker. Although originally the respondents denied that he was a "manager" under the Order, it is now admitted that such was his position. And whatever, on general considerations, may be the position of an ordinary worker it appears to me to be capable of demonstration that the position of such a "foreman or manager" is at any rate such as I have stated.

To make this good, I must refer to one provision of the Act of 1918, and to some provisions of the Order.

Sect. 3, sub-s. 1 (*b*), of the Act of 1918 introduced a new form of time rate, which it terms a "guaranteed time-rate." The rate is there described as follows: "A minimum time-rate (which shall not be higher than the general minimum time-rate) to apply in the case of workers employed on piece work for the purpose of securing to such workers a minimum rate of remuneration on a time-work basis." And the concluding words of the sub-section provide that any of the minimum rates there referred to may be fixed so as to apply (inter alios) "to any class of workers in the trade." Now Sch. I. of the Order which prescribes the minimum time rates in Part I. sets forth the "general minimum time-rates

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. . . . for male workers (including foremen and managers) and guaranteed time-rates for foremen and managers," and it applies the "guaranteed time-rate" to the remuneration only of "foremen or managers." But it prescribes it as the minimum rate for all "foremen or managers" under whatever branch of the definition of these words (s. III. of Part IV.) they come: whether they be male (s. VII., Part I.) or female (s. III., Part II., Sch. III.).

The remuneration, prescribed, although in different paragraphs both for men and women, is fixed by the same form of words, and for males (s. VII., Part I., Sch. I.) is as follows:—

"Foremen and Managers as defined in section III. of Part IV. of this Schedule—

General Minimum Time Rate . . . . . 80*s.*

Guaranteed Time Rate . . . . . 80*s.*

"A foreman or manager employed on piece work must be paid not less than the guaranteed Time Rate in any case where his earnings on piece work are less than such sum":

This figure of 80*s.* is for a week of forty-eight hours: it is based on an assumed cost of living figure. I omit any statement of increases for overtime or of changes by reason of variation in the cost of living.

Now, my Lords, this provision must be read in connection with the definition of a foreman or manager in s. III. of Part IV., which stated in full is as follows: "A foreman or manager is a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and (*a*) Who exercises sole supervising authority over all journeymen exceeding three in number (excluding the foreman or manager) working in the same shop or department; or (*b*) Who (whether working alone or with any other worker), under the terms of his employment, in addition to any work which may be required of him as a journeyman, fits up or supervises the fitting-up of the work and has control of the repairing or making and the technical direction thereof."

Under that definition it seems clear that a foreman or manager within the first class defined who exercises sole supervising authority over all journeymen exceeding three,

must in the normal case have much of his time taken up with other than manual work: while a foreman or manager, within the second class defined—and this is the appellant's class—while working with another worker, and even when working alone will when engaged on work of fitting up, supervision, control or direction have some, it may be much, of his time taken up with non-manual work. Indeed the very notion of management may well connote the convenience if not the necessity of personal presence where and when the work managed is being carried on even if that work be the manager's own. And this idea, perhaps implicit in the definition itself, is given effect to in the requirement that the minimum remuneration of the foreman or manager shall be on the basis of a guaranteed time-rate where such rate exceeds his actual minimum earnings on piece work—a requirement, as I have said, made applicable to every manager or foreman of either class however large or small may be the proportion of his working day taken up in piece work.

Now, what was the guaranteed time-rate as applied to the appellant? If a promise to pay for a particular number of hours of attendance would amount to such a guarantee—and this I suppose would almost admittedly be so—then the same guarantee must surely result from the imposition upon the appellant of a positive obligation that for sixty-three hours in every week he must be in attendance to act during the whole period as respondents' manager as and when occasion for the discharge of managerial duties arose. To me accordingly it appears clear that the appellant has established the soundness of the sixth reason which is attached to his case: "According to the evidence the appellant was a foreman or manager employed on piece work and by the provisions of . . . . the Order . . . . had to be paid not less than the guaranteed time-rate, because his earnings throughout his employment were less than the amount of the guaranteed time-rate." It follows that his claim in this action—for there is, I gather, no dispute as to the figures—is made good. It follows also that on this view of his rights there can be no distinction between the meal hours of the appellant spent

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under obligation on the respondents' premises and any other of the sixty-three hours a week also spent there.

My Lords, from this point of view the agreement with the appellant so far as remuneration was concerned had it merely imposed upon him an obligation to attend upon the respondents' premises for a prescribed number of hours would have been void. In my judgment it is only made the more obnoxious to the statute by the fact that it purports to impose upon the appellant during any idle time out of these hours the performance of other duties. So regarded the provisions of the agreement relied upon in the Courts below as showing that the appellant's employment was of a dual description merely aggravate the respondents' difficulty in upholding the validity of the agreement in face of the Acts and Order.

My Lords, had I felt myself compelled to approach this case from the angle from which it was regarded in the Courts below I would have hesitated long before I endorsed the conclusions there reached even on that footing. But I refrain from further discussion of this aspect of the case in a judgment already too long.

In my view this appeal should be allowed.

LORD WARRINGTON OF CLYFFE. My Lords, the appellant is a worker in the boot and shoe repairing trade and is a foreman or manager within the terms of the definition contained in Part IV., s. III., of Sch. I. to the Order of August 8, 1922, made by the Minister of Labour under the Trade Boards Acts, 1909 and 1918. In that capacity he was during his employment by the respondents hereinafter mentioned entitled to the minimum wages fixed by that Order. He has brought the present action against the respondents alleging that during his employment by them he was not paid the full minimum wages due to him and claiming the sum of 363*l.* 10*s.* 6*d.* as the balance remaining due. The respondents defended the action on the broad ground that in his capacity as a worker, in which alone he was entitled to the minimum wages, he has received the full sum due to him, and that during the hours of employment not covered by his wages

as a worker he was employed in another capacity in respect of which he was not entitled to the minimum wages. The action was heard by MacKinnon J., who, on December 1, 1927, pronounced judgment for the defendants with costs; and this judgment was, on March 7, 1928, affirmed by the Court of Appeal (Scrutton and Sankey L.JJ. and Romer J.), who dismissed the appeal with costs. The present appeal is from that order.

The question is entirely one of principle and no figures are involved.

The respondents have a number of boot and shoe repairing shops. For about three years the appellant was in the employment of the respondents at a small shop of theirs in Manchester under an agreement of January 3, 1923. He was the only person employed in the shop.

After the judgments which have already been delivered it is unnecessary for me to state the terms of the agreement in full; it is enough to say that, besides agreeing to do all kinds of boot repairing, he had to perform a number of duties incident to the position of a shop-keeper, such as keeping accounts, cleaning and dressing the shop, keeping it open and remaining in attendance thereat during business hours, selling goods known as sundries, and so forth. For all this he was to receive wages at the rate of 2*l.* 18*s.* per week with certain provisions whereby his wages might be increased according to a sliding scale. His work as an operative worker in the trade occupied about half the number of hours he was employed in the shop, and for these hours he received the minimum wages due to him under the Act and Order. They did not amount to the wages fixed by the agreement, the balance of which was duly paid to him. He now insists that he was entitled to minimum wages for the entire number of hours during which he was present in the shop and claims as due to him the sum above referred to.

The question really turns upon the true construction and effect of s. 8 of the Trade Boards Act, 1918, and if this is decided against the appellant a minor question as to payment during meal times does not arise and his appeal will fail.

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Sect. 8 is in the following terms: "For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum rate of wages has been fixed under the Principal Act, the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves that he was so present without the employer's consent express or implied, or that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform, and, in the case of a worker employed on piece-work, shall be deemed during any time during which he was so present and was not doing piece-work to have been employed at the general minimum time-rate applicable to workers of the class to which he belongs: Provided that . . . . (*b*) a worker while present during normal meal-time in a room or place in which no work is being done shall be deemed to be present for a purpose unconnected with his work."

I agree with the learned judges in the Courts below that the respondents have satisfied the onus cast upon them by this section. The scheme of the Trade Boards Acts was obviously a scheme to provide minimum wages for a particular class of persons employed in the trade—namely, those who are called "workers" and who perform the manual operation of repairing boots and shoes. This is made abundantly clear by a reference to the several Schedules to the Order of August 8, 1922, in which the several descriptions of work and the appropriate wages are described in detail. Accordingly the worker entitled to the benefit of s. 8 is one employed on any work for which a minimum rate of wages has been fixed. As soon as this worker ceases to perform the work so described, then, if he is employed under a general agreement of service such as that in the present case, he automatically becomes employed, and is on the employer's premises, for some one or more of all the general purposes of shop-keeping covered by his agreement. These purposes are not connected with his work as described in the section—namely, the manual work of repairing. For example, he has to keep the shop

open during business hours, whether there is any "work" to be done or not. I think the opposite view ignores the clear distinction between employment for which alone the minimum wages are provided and employment in the business generally for which no such provision is made, and the section appears to me to be directed to keeping alive that distinction, though the two employments may exist side by side in the same employee. Moreover, the man in such a case is not waiting for work to be given him to perform : this is an expression which in my opinion connotes a period of enforced idleness which would subject him to considerable hardship if it were not taken into account. The opposite view might entail hardship on both employer and employed or it might render it impossible for an employer to offer, or for a worker to accept, a settled employment such as that in the present case.

For these reasons I agree that the appeal fails and ought to be dismissed with costs.

LORD BUCKMASTER. My Lords, my Lord Sumner desires me to say that he agrees with the opinions of my Lord Dunedin and my Lord Warrington which have been read.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 7, 1929.

Solicitors for the appellant : *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for the respondents : *T. D. Jones & Co., for Topham & Phillips, Harrogate.*

[HOUSE OF LORDS.]

H. L. (E.)* 1929 April 16.

CLAN LINE STEAMERS, LIMITED . . APPELLANTS;

AND

BOARD OF TRADE . . . . . RESPONDENTS.

THE CLAN MATHESON.

Shipping—Charterparty T.99—Requisitioned Vessel—Convoy—War or marine Risk—Consequence of "Warlike operations"—Proximate Cause—Requisitioned Vessel, owing to defective Steering Gear, colliding with Warship.

The steamship *Clan Matheson* was requisitioned on behalf of the Crown in 1917 by a charterparty in the T.99 form, which provided by cl. 18, that the Crown should not be liable for marine risks, but, by cl. 19, should be liable for "all consequences of hostilities or warlike operations." Whilst so requisitioned she sailed from New York in convoy. She was the third ship in the second column from the port hand in the convoy, the *Western Front* being in the corresponding position in the port column. While the convoy was proceeding at night without lights the steering gear of the *Clan Matheson* suddenly broke down, she steered seven points off her course and came across the bows of the *Western Front*, by which she was struck and sunk. It was admitted that the *Western Front* was engaged upon a warlike operation and that the *Clan Matheson* was not. There was no negligence on the part of either vessel. On a claim against the Crown by the owners of the *Clan Matheson* for her loss:—

Held, that the loss was not a consequence of a warlike operation, inasmuch as the collision was solely due to the breakdown of the steering gear of the *Clan Matheson*.

Decision of the Court of Appeal [1928] 2 K. B. 557 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Wright J. on an award stated in the form of a special case.

The question for determination was whether upon the facts of the case the loss of the appellants' steamship *Clan Matheson*, which took place as the result of a collision between the *Clan Matheson* and the steamship *Western Front*, was a consequence of hostilities or warlike operations within the

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, LORD BUCKMASTER LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

(1) [1928] 2 K. B. 557.

meaning of cl. 19 of the Charterparty T.99 or arose as a sea risk within the meaning of cl. 18 thereof.

The arbitrator held that it was a consequence of warlike operations, Wright J. held that it was not, and the Court of Appeal by a majority (Scrutton and Lawrence L.JJ.; Greer L.J. dissenting) affirmed his decision.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of the Lord Chancellor and are summarized in the headnote.

1929. Feb. 11, 12. *Jowitt K.C.* and *Langton K.C.* (with them *A. T. James K.C.* and *James MacMillan*) for the appellants. The loss of the *Clan Matheson* was due to her collision with a warship engaged in a warlike operation and it was therefore a consequence of a warlike operation within cl. 19 of Charterparty T.99. From the point of view of marine insurance it has been settled for over a century that the only relevant inquiry is as to the nature of the collision —into what category it falls—and that it is immaterial to inquire whose fault it was: *Busk* v. *Royal Exchange Assurance Co.* (1); *Walker* v. *Maitland* (2); *Bishop* v. *Pentland* (3); *Redman* v. *Wilson.* (4) The principle established by those authorities is that the rule causa proxima non remota spectatur applies and that underwriters are liable for a loss the proximate cause of which is a peril insured against, though the remote cause may be traced to the negligence of the master and mariners. *Ionides* v. *Universal Marine Insurance Co.* (5) is the converse of the present case. There the proximate cause of the stranding of the ship was the master being out of his reckoning and running on to the rocks, which was a peril of the sea, and not the extinguishment of the light at Cape Hatteras, which was a hostile act. Here the proximate cause of the loss of the *Clan Matheson* was the blow dealt her by the *Western Front.* As to the war cases before your Lordships' House: In the case of *The Petersham* (*Britain Steamship Co.* v. *The King*) (6) it was

(1) (1818) 2 B. & Al. 73, 80.
(2) (1821) 5 B. & Al. 171, 174, 176.
(3) (1827) 7 B. & C. 219, 223.
(4) (1845) 14 M. & W. 476, 483.
(5) (1863) 14 C. B. (N. S.) 259.
(6) [1921] 1 A. C. 99.

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held that a collision due to the absence of lights was not a consequence of a warlike operation. In the case of *The Matiana* (*Green* v. *British India Steam Navigation Co., etc.*) (1), where a vessel sailing at night under convoy without lights in a region infested by submarines was wrecked by striking a reef, it was held by a majority that the loss was not a consequence of a warlike operation. In the cases of *The Ardgantock* and *The Richard de Larrinaga* (*Attorney-General* v. *Ard Coasters* and *Liverpool and London War Risks Insurance Association* v. *Marine Underwriters of Steamship Richard de Larrinaga*) (2), where a warship engaged in a warlike operation ran into a merchantman, it was held that the loss was a consequence of a warlike operation. Those two cases cover the present. The language of Viscount Dunedin is directly in point. He says, "In the *Ard Coasters* case I think the judgment may be put in the form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The *Tartar* was engaged in such patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation." Viscount Finlay's observations are to the same effect. In the case of *The Geelong* (*Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*) (3) it was held that a merchantman carrying ambulance wagons from one war base to another was engaged in a warlike operation and, when once that conclusion was reached, the case was the same as the *Ardgantock* case. Viscount Finlay, after stating that a collision between merchantmen caused by navigating at full speed at night without lights in obedience to regulations in force during war time did not by itself make the loss one resulting from a war risk, continued, "But if one or both of the vessels were engaged at the time in a warlike operation it becomes a war risk as being a consequence of a warlike operation." In the case of *The Warilda* (*Attorney-General* v. *Adelaide Steamship Co.*) (4) it was held that the negligence of a warship in running into another vessel does

(1) [1921] 1 A. C. 99.
(2) [1921] 2 A. C. 141, 147, 152.
(3) [1923] A. C. 191, 201.
(4) [1923] A. C. 292.

not prevent the loss being a consequence of a warlike operation. The case of *The Trevanion* (*Hain Steamship Co.* v. *Board of Trade*) (1), which is a decision of the Court of Appeal, raised the same question. Greer L.J. there says, that if what happened is a consequence of a warlike operation it is none the less so because it is also a consequence of faulty navigation of one or other or of both of the colliding vessels, and that for this purpose negligent navigation of either or of both vessels is irrelevant. If then it is admitted that the proximate cause of the loss of the *Clan Matheson* was the collision with the *Western Front*, that is the end of the case. But suppose these were two proximate causes. That question was also raised by *The Trevanion* case, and it was there laid down by Greer L.J. that when a collision was caused by more than one proximate cause, one of which was a warlike operation, it was taken out of the sea risk by the warranty, inasmuch as it was a consequence of a warlike operation. That is in accordance with the principle of *Reischer* v. *Borwick* (2) approved by this House in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (3) that where a loss is occasioned by two proximate causes the assured may recover against the underwriters of one peril, though the other peril may also have been a contributing cause. It follows that if the loss of the *Clan Matheson* was proximately caused partly by her being run into by a warship and partly by a defect in her own machinery, the appellants are still entitled to succeed. A proximate cause being the blow struck by the *Western Front*, a warship engaged in a warlike operation, the loss is the result of a war risk. For the purpose of this argument a distinction is to be drawn between a collision which takes place by reason of a breakdown of machinery and by reason of human agency, for the latter may be a novus actus interveniens. The reasoning of the Court of Appeal in this case is vitiated by the fact that they have gone behind the collision. Assuming that it is right to go behind the collision, the totality of the causes must be considered and regard must

(1) [1928] 2 K. B. 534, 555. (2) [1894] 2 Q. B. 548.
(3) [1918] A. C. 350.

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be had to the fact that all these vessels were huddled together by the convoy formation. There is nothing in *The Matiana* case (1), which is opposed to this view.

[They also referred to *William France, Fenwick & Co.* v. *North of England Protecting and Indemnity Association.* (2)]

Sir Thomas Inskip A.-G. and *Raeburn K.C.* (with them *Russell Davies*) for the respondents. Wright J. put the respondents' case when he said that the vessel engaged in the warlike operation was the instrument and not the cause of the loss. This is not a case of concurrent causes. Before the case can be got into cl. 19 it must be got out of cl. 18. It must be a risk which is excepted from the risks for which the Admiralty is not responsible. There can be no case of double insurance where the risks are mutually exclusive. The operation of *Reischer* v. *Borwick* (3) is excluded by the form of the T. 99 charterparty. Collision is a risk included in an ordinary English policy and there must be an affirmative discharge of the burden lying upon the claimant of proving that what is prima facie a sea peril is the result of a warlike operation. There are only two possible grounds on which this loss can be said to be the consequence of a warlike operation. The first suggestion is the convoy formation, but this is negatived by the authorities, which show that sailing without lights, plus sailing under convoy, does not constitute a warlike operation. *The Matiana* case (1) establishes the broad proposition that sailing under convoy is not a warlike but a peaceful operation. Secondly, it is said that the fact that the *Western Front* was a warship engaged in a warlike operation establishes the appellants' case. But the *Western Front* did nothing to cause the collision and could have done nothing to avoid it. On principle that is not a sound proposition. Upon the authorities, in every single instance in which it has been held that the loss was a consequence of a warlike operation the ship engaged in the warlike operation was the aggressor. In *The Ardgantock* and *The Richard de Larrinaga* cases (4) it was the activity of the

(1) [1921] 1 A. C. 99.
(2) [1917] 2 K. B. 522.
(3) [1894] 2 Q. B. 548.
(4) [1921] 2 A. C. 141.

war vessel which caused the collision, and the judgments proceeded on that view. So also in the cases of *The Geelong* (1) and *The Warilda*. (2) In none of those cases is there any authority for the proposition that if a peaceful ship by her action causes the collision that is a consequence of a warlike operation, with the single exception of the speech of Viscount Finlay in *The Ardgantock* case. In the respondents' submission that language is too wide. In *Charente Steamship Co.* v. *Director of Transports* (3) Roche J. said that "if a merchant ship was solely to blame for a collision, then, speaking broadly, it would seem to follow in most cases that the collision would not be a result of hostilities because it was not the result of a warship's acting in a warlike operation." If the collision was caused by the action of the peaceful vessel it is immaterial whether it was brought about by the negligence of the crew or by the breakdown of the machinery. If the warlike vessel is not the cause of the collision the appellants have failed to discharge the burden resting upon them of proving that the collision was due to a warlike operation. The answer stands that the collision was due to the breakdown in the steering gear. That is the common sense view of the matter. It is said that the Court must not go behind the collision, but in *Ionides* v. *Universal Marine Insurance Co.* (4) Erle C.J. looked behind the stranding to the real cause of the loss and held that the ship was driven into the bay by the storm. Both on principle and on authority the Court of Appeal were right.

Jowitt K.C. in reply referred to Chalmers' Marine Insurance Act, 1906, 3rd ed., pp. 85, 90.

The House took time for consideration.

April 16. LORD HAILSHAM L.C. My Lords, this is an appeal from an order of the Court of Appeal affirming the decision of the King's Bench Division upon an award stated in the form of a special case ; the question which arises for determination is whether upon the facts as found by the arbitrator the respondents are liable to pay to the appellants

(1) [1923] A. C. 191.
(2) [1923] A. C. 292.
(3) (1921) 38 Times L. R. 148, 149.
(4) 14 C. B. (N. S.) 259.

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a sum of 265,000*l.*, representing the value of a steamship known as the *Clan Matheson* at the date of her loss in May, 1918. The appellants were at all material dates the owners of the *Clan Matheson*, which was requisitioned by letters dated September 28, 1917, upon the terms of a charterparty known as "T. 99."

By cl. 18 of the charterparty it was provided as follows: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked . . . . by, or in consequence of, collision . . . . or any other cause arising as a sea risk." Clause 19 of the charterparty provided: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary insurance policy of marine insurance by the following but not more extensive clause:—'Warranted free of capture, seizure, or detention, and the consequences thereof . . . . and also from all consequences of hostilities or warlike operations . . . .'"

On May 17, 1918, whilst the *Clan Matheson* was still under requisition upon the terms of the charterparty she sailed from New York in convoy. She was bound for Nantes and her cargo consisted as to 84 per cent. of stores intended for the civil commissariat and as to 16 per cent. for the military authorities.

The convoy sailed in columns; the *Clan Matheson* was the third ship in the second column from the port hand; the regulation distance between each ship in the same column was 400 yards and the regulation distance between the columns was 800 yards; the corresponding ship in the port column was a vessel called the *Western Front*, which was under charter to the Government of the United States of America and was bound for St. Nazaire with a cargo made up entirely of war supplies for that Government; St. Nazaire was a war base.

On the night of May 22–23, 1918, the convoy was proceeding at a speed of from 9 to 9½ knots; there was a rough sea; the convoy was sailing without lights, but it was a moonlight night, visibility was good and every vessel in the convoy could easily be seen. About 1 A.M. the second officer

of the *Clan Matheson*, who was then on watch, noticed that the ship ahead of him in his column was on his starboard bow. He ordered the quartermaster to port the helm, but found that the ship did not respond. He repeated the order, and then went to the helm and found the wheel hard a-port. He suspected that something in the steering gear had suddenly given way, and he called the captain and the chief engineer. The engines were put astern and attempts were made to adjust the steering gear, but meanwhile the *Clan Matheson* swung right across the bows of the *Western Front*, which struck her amidships and approximately at right angles. The *Clan Matheson* sank within two hours and became a total loss; the time which elapsed between the moment when the second officer first noticed that the *Clan Matheson* was out of her course and the moment of the collision was estimated by him at from 2½ to 4 minutes, and this seems on the data given to be an outside estimate. It was admitted on the pleadings that the *Western Front* was engaged upon a warlike operation; it was contended before the arbitrator that the *Clan Matheson* was also engaged upon a warlike operation; the arbitrator negatived this contention and though the appellants challenged this finding in the Courts below, at your Lordships' bar it was conceded that the finding was one of fact and that there was material to support it and the contention was abandoned. There was no express finding upon the question whether there was negligence in the navigation of the *Western Front*; but in the Courts below counsel for the appellants admitted that negligence on the part of those in charge of the *Western Front* could not be suggested—that is to say, in the language of the learned judge, "The *Western Front* could not avoid striking the *Clan Matheson* as she did when the *Clan Matheson* swung out of her course and across the bows of the *Western Front*." The arbitrator held that there was no negligence on the part of the appellants or those in charge of the *Clan Matheson* and he found "that immediately before the collision the steering gear of the *Clan Matheson* broke down and failed to operate, and that by reason thereof the said vessel sheered to port and across the course of the *Western Front*."

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So far as appears, there was no suggestion at the time of the accident that the Admiralty was under any liability in respect thereof; but on August 11, 1926, encouraged apparently by their reading of certain decisions in your Lordships' House, the appellants by their solicitors wrote a letter to the respondents alleging that at the date of the collision the *Clan Matheson* was upon a warlike operation, and that there was therefore a claim upon those bearing the war risk insurance under the charterparty.

The claim was referred to the sole arbitration of Mr. Claughton Scott, from whose award I have extracted the findings of fact to which I have called your Lordships' attention. The learned arbitrator held upon these findings that the loss of the *Clan Matheson* was a consequence of warlike operations within the meaning of cl. 19 of the charterparty, and consequently that the respondents were liable; and he stated his award in the form of a special case. The special case was argued before Wright J., and he reversed the decision of the arbitrator. From that judgment the appellants appealed to the Court of Appeal, and by a majority (Scrutton and Lawrence L.JJ.; Greer L.J. dissenting) that Court upheld the decision of the judge and dismissed the appeal; from this decision the present appeal is brought.

In order to decide the question raised in the appeal it is necessary to refer to certain decisions which have already been given in this House upon the construction to be placed upon these two clauses in the charterparty. In the case of *The Petersham* (*Britain Steamship Co.* v. *The King*) (1), it was held that sailing without lights is not a warlike operation. In the case of *The Matiana* (*Green* v. *British India Steam Navigation Co.*; *British India Steam Navigation Co.* v. *Liverpool and London War Risks Insurance Association*) (1), which was heard and decided at the same time, it was held that sailing under convoy is not a warlike operation. In the cases of *The Ardgantock* and of *The Richard de Larrinaga* (*Attorney-General* v. *Ard Coasters, Ld.*; *Liverpool and London War Risks Insurance Association* v. *Marine Underwriters of*

(1) [1921] 1 A. C. 99.

Steamship Richard de Larrinaga) (1), it was held that if a warship carrying out her naval duties in time of war comes into collision with a merchant vessel without any negligence on the part of those in charge of either the warship or the merchant vessel, the resultant damage to the merchant vessel is a consequence of warlike operations. In the case of *The Geelong* (*Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*) (2), it was held that a merchant vessel carrying war stores from one war base to another war base for the British Government in time of war was engaged upon a warlike operation and therefore in the same position as a war vessel. In the case of *The Warilda* (*Attorney-General* v. *Adelaide Steamship Co.*) (3), it was held that where a ship engaged on a warlike operation comes into collision with another vessel, the damage done to the former ship is none the less a consequence of a warlike operation because those in charge of that vessel have been guilty of negligence which brings about the collision. There is in addition a decision of the Court of Appeal in the case of *The Trevanion* (*Hain Steamship Co.* v. *Board of Trade*) (4), that if a collision occurs between a vessel engaged in a warlike operation and a merchant vessel owing to negligence in the navigation of both vessels the collision is none the less a consequence of warlike operations within cl. 19 of the charterparty. Your Lordships were informed that this last decision is under appeal to your Lordships' House; it is not necessary to express any opinion as to its correctness in order to determine the present case, and I do not propose to discuss it in this judgment.

Counsel for the appellants contended that these authorities established that a collision between a vessel engaged in a warlike operation and a merchant vessel is the consequence of a warlike operation where neither vessel is to blame; that it is none the less a consequence of a warlike operation if those in charge of the warship are to blame; that if the decision in *The Trevanion* be correct it is none the less the

(1) [1921] 2 A. C. 141.
(2) [1923] A. C. 191.
(3) [1923] A. C. 292.
(4) [1928] 2 K. B. 534.

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consequence of a warlike operation if those in charge of both vessels are to blame; and they asked your Lordships to say that the true principle was that wherever a collision occurs between a vessel engaged upon a warlike operation and another vessel, the damage resulting from that collision is the consequence of a warlike operation within the meaning of cl. 19 of the charterparty. On the other hand, the Attorney-General argued that in the cases cited the warship was, as he expressed it, the aggressor; and he contended that in order to determine whether the loss fell within cl. 18 or cl. 19 of the charterparty, it was necessary to decide whether the collision was due to the action of the war vessel or to some other cause.

My Lords, it is a well settled principle of marine insurance law that causa proxima non remota spectatur; and it was expressly determined in the well known case of *Ionides* v. *Universal Marine Insurance Co.* (1), that this maxim is applicable in cases in which the question to be decided is whether the loss is due to a marine risk or to a war risk. There is no doubt therefore that it must be applied in the present case. But in my opinion its application does not lead to the result for which the appellants contend. By the express terms of cl. 18 of the charterparty, the Admiralty is not liable if the steamer be lost in consequence of a collision; while cl. 19 excludes from these losses for which the Admiralty is not liable, collisions which are the consequence of warlike operations. This necessarily imposes upon the tribunal the duty of determining in the case of loss by collision whether or not that collision is the consequence of a warlike operation; and I have no doubt that in determining this question the proximate cause of the collision is the one which has to be looked at. But this does not mean that you must exclude from consideration everything which happened before the actual impact took place; the illustrations given by Erle C.J. in his judgment in *Ionides'* case are sufficient to establish that proposition. In the present case the facts found by the arbitrator show that the collision was due, and

(1) 14 C. B. (N. S.) 259.

was due solely, to the breakdown of the steering gear of the *Clan Matheson*. From the moment that that breakdown occurred nothing which could be done by those in charge of either vessel could prevent the collision, and in my opinion in law as well as in ordinary parlance, the collision was the consequence of that breakdown.

The conclusion which I have reached is supported by the high authority of Lord Sumner in *The Warilda* case (1), to which I have already referred. Lord Sumner says: "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same, if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision." It was contended that this passage was only an obiter dictum and that it should be overruled; but in my opinion it is an essential part of the reasoning upon which the judgment proceeds, and in any event I regard it as a correct statement of the law. I agree with the view taken by Wright J. in his admirable judgment, and it follows that I am unable to accept the reasoning of Greer L.J. in the Court of Appeal. It seems to me that the learned Lord Justice fails to give sufficient weight to the fact that from the moment when the steering gear broke down the collision was inevitable, having regard to the situation in which the *Clan Matheson* then found herself in relation to the *Western Front*.

In my opinion the order appealed from is correct, and I move, your Lordships, accordingly.

(1) [1923] A. C. 292, 305.

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My Lords, I am asked by my noble and learned friend Lord Blanesburgh to say that he concurs in this judgment.

VISCOUNT SUMNER. My Lords, in a claim for indemnity made in the shipowner's name on Charterparty T.99, the claimants must show that the loss was one (*a*) excluded from an ordinary marine risks policy by the specified f.c. and s. clause, and (*b*) caused in the insurance sense of that word by a peril, which in this case is some warlike operation. The *Clan Matheson* foundered after being in collision with the *Western Front*. Foundering and collision are perils insured against under an ordinary marine policy. Before the collision the *Western Front* and the *Clan Matheson* were sailing together in convoy at night, the *Western Front* admittedly being, by reason of her cargo and her employment, herself engaged in the warlike operation of proceeding with munitions of war for the Government of the United States to a war base in France, while, on the other hand, the *Clan Matheson* in herself admittedly was not so engaged, though it was argued somewhat faintly, that she became so when she sailed in convoy. Your Lordships have already decided the contrary of this last contention and any discussion of it is merely academic and in legal proceedings is irrelevant. The appellants' case therefore is that the *Clan Matheson* was lost, because the *Western Front*, in the course of her warlike operation, cut her down amidships in collision. On this it is necessary to examine the facts set out and the conclusions arrived at in the award, which is stated in the form of a special case for the opinion of the Court.

Both these vessels were large. The *Clan Matheson's* length was 405 feet and that of the *Western Front* must have been considerable also. In the prescribed order of the convoy the *Western Front* was on the *Clan Matheson's* port hand and was in line with her distant 800 yards, while in each case the distance from the ships ahead and astern was 400 yards. The speed of the convoy generally was 9 to 9½ knots. The *Clan Matheson's* steering gear fortuitously went wrong and she took and kept a fixed sheer to port. By estimate

2½ to 4 minutes passed from the time when this sheer was first noticed to the actual collision. As the *Clan Matheson* got across the *Western Front's* bows and the angle of impact was about a right angle, either the *Western Front* was abaft or the *Clan Matheson* was ahead of her due station, or both, at the commencement of and during the sheer, but its duration can only be estimated generally, for the exact positions of the ships are not known. The award finds that, when the breakdown of the *Clan Matheson's* steering gear had been discovered, her engines were put astern and the appropriate signals were made. It does not find whether the *Western Front* used, or could have used, either her engines or her helm to arrest or modify the consequences of the *Clan Matheson's* sheer, but the appellants' counsel disclaimed any charge of negligence in the *Western Front's* navigation, just as the award itself exonerated those in charge of the *Clan Matheson*. There was a moon and the sea was rough with considerable swell, but all the same visibility is said to have been good. In these circumstances it is not to be expected that the change of the *Clan Matheson's* course would be apparent to those on the *Western Front* till after, and probably substantially after, the moment at which it was visible to her own officers, and, in view of the shortness of the time between the change of course and the collision and the difficulties in the way of any manœuvring of the *Western Front* owing to the proximity of other vessels, I think that the effect of these facts and of the absence of any charge of negligent navigation is logically that in the circumstances nothing could have been done to avert the collision.

The award concludes that the proximate cause of the foundering of the *Clan Matheson* was the impact of the *Western Front* and not her own sheer, but this conclusion the arbitrator submits to the Court. It appears to me that on the facts found the collision had become inevitable for a material, if not a measurable, time before the impact occurred, and, if so, the character of the other vessel, as well as the direction of her course and of the blow, fail to become material. The *Clan Matheson* had become irretrievably a loss by a marine

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peril before the collision happened, and the character of the object with which she collided was a pure incident. If it had not been the *Western Front* it would have been some other ship.

There are many cases in the books in which a ship or cargo, though still physically untouched, is held to have been so affected by a peril as to be lost by it, though disappearance or dissolution only come at an interval afterwards. This peril, having "begun to operate" and there being no escape, is held then to be the proximate cause. Such is Erle C.J.'s illustration in *Ionides* v. *Universal Marine Insurance Co.* (1) of a ship, which gets embayed on a lee shore while flying from captors and so is wrecked, the loss here being by capture or a similar consequence of hostilities. Probably this is the best illustration to be found, but reference may also be made to *Bondrett* v. *Hentigg* (2) and *Hahn* v. *Corbett.* (3)

At first sight there may seem to be something paradoxical in saying that a ship is lost when she is still afloat and, apart from the jamming of the steering gear, is still uninjured, but it is not illogical. In the great majority of cases the question may be of no moment, since the ordinary policy covers so many perils, but whenever it is necessary to consider whether a limited insurance applies or not, for example a time policy or a policy against the risks excluded by the f.c. and s. clause, it becomes necessary also to inquire in what exactly the loss consists and when it happens, and in such cases it cannot be predicated of the subject-matter insured that no loss has happened to it, when it has been so affected by perils insured against that nothing can save it from ultimate destruction. The element of uncertainty as to the effect of subsequent events may go to the measure of the loss or to the necessity of giving notice of abandonment, but it cannot prevent an operative peril, which has already taken charge of the ship, from being its cause of loss when its complete operation cannot be arrested.

(1) 14 C. B. (N. S.) 259, 286. (2) (1816) Holt N. P. 149.
(3) (1824) 2 Bing. 205.

The appellants' argument took up the incidents of this casualty in the reverse order. They found a sinking of the *Clan Matheson* in consequence of a collision, in which, having fallen athwart the course of the *Western Front*, she was cut into by that vessel's bows as she proceeded on her course pursuing the warlike operation in which she was engaged. "Here," said they, "is the cause of the loss, and the rule of proximate cause forbids any anterior research for a remoter cause or condition." The validity of this argument depends entirely on its being established that the impact of the *Western Front* was the proximate cause of the loss, that the collision which thus took place would have been excluded from an ordinary marine policy by the perils specified in cl. 19 and that the advance of the *Western Front* through the water was, in the circumstances, in itself a warlike operation. For this purpose the facts must be looked at. When an assured is covered equally by two policies he may be entitled to recover against whichever policy he chooses to rely on, but if he is covered in one event only by one and by another only in another event he has not a free choice to elect what peril he will declare to win on but must be governed by the facts of the casualty. If the true view of the facts is that the *Clan Matheson* was already a lost ship before impact occurred, the subsequent events only determine the mode and measure of a loss, already caused aliunde. On the facts, Wright J. and, as I read their judgment, the majority of the Court of Appeal considered that this was so, and I agree with them. If so, the above argument fails in limine, and the *Western Front* was not the cause of this loss. I forbear to criticize the other elements involved in that argument. Hostilities only terminated a little over ten years ago, nor were warlike operations necessarily brought to an end even by the armistice, and in the deliberate gestation of Government law suits we do not know what further appeals may yet await decision or what arguments founded on the "warlike operations" cases and *Reischer* v. *Borwick* (1) may need consideration in the course of them. Accordingly, I will

(1) [1894] 2 Q. B. 548.

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only venture to add this. In arguing questions of proximate cause in marine insurance, the temptation is always strong to resort to a minute analysis of the circumstances of a casualty, in order to place the cause as proximately to the conclusion of them as possible. It is a natural way in which to apply the rule as it is laid down in the books. I think, however, that Lord Bacon's warning against inquiry into the causes of causes applies equally forcibly to a microscopic analysis of the incidents of a casualty as a means of discovering the proximate cause. His phrase appears to me to apply equally to an infinitely intensive analysis as to an infinite historical retrospect.

I think that the appeal fails.

LORD BUCKMASTER. My Lords, I agree.

LORD WARRINGTON OF CLYFFE. My Lords, on the night of May 22–23, 1918, in mid-Atlantic, the *Clan Matheson*, a ship belonging to the appellants, was sunk as the result of a collision with a ship called the *Western Front*, in charter to the American Government, manned by naval ratings and carrying war stores to Nantes, the American base in France.

The *Clan Matheson* was in charter to the British Government under the well known pro forma Charter T. 99, under which the Government take the risks of war, including particularly all consequences of hostilities or warlike operations.

The appellants contend that the sinking of the *Clan Matheson* was a consequence of warlike operations and that accordingly the Government, now represented by the respondents, the Board of Trade, is liable for her loss. The respondents, on the other hand, insist that the sinking was an ordinary peril of the seas for which they are not liable.

The question was referred to the late Mr. Claughton Scott as sole arbitrator, and on March 28, 1928, he made his award in the form of a special case. He found as facts and held in so far as they were questions of law :—

(1.) That the *Clan Matheson* was not at any material time engaged upon or carrying out a warlike operation.

(2.) That there was no negligence on the part of the appellants or any of those in charge of the *Clan Matheson*.

(3.) That immediately before the collision the steering gear of the *Clan Matheson* broke down and failed to operate and that by reason thereof the said vessel sheered to port and across the course of the *Western Front*.

(4.) That the sinking of the *Clan Matheson* was proximately caused by the impact of the *Western Front* moving in the course of a warlike operation which she was then carrying out.

(5.) That the sheering of the *Clan Matheson* to port was not the real or proximate cause of her loss within the meaning of the charterparty.

(6.) That the sinking of the *Clan Matheson* was a consequence of warlike operations within the meaning of the charterparty, and he accordingly held, subject to the opinion of the Court upon the question of law submitted by him, that the sinking of the *Clan Matheson* was a consequence of warlike operations within the meaning of the charterparty, and that the respondents were liable to pay to the appellants the value of the ship at the time of the accident—namely, 265,000*l*.

The special case was heard by Wright J. on May 9 and 14, 1928, who, in a very careful and elaborate judgment, held that the loss of the *Clan Matheson* was not a consequence of warlike operations, and that accordingly the respondents were not liable.

On appeal to the Court of Appeal that Court on July 19, 1928, by a majority (Scrutton and Lawrence L.JJ.; Greer L.J. dissenting), affirmed the judgment of Wright J. and dismissed the appeal. Hence the present appeal.

It is unnecessary to state the facts in detail. It is enough to say that the ships were sailing in convoy under escort of ships of war and without lights, but it is not contended, and in fact could not on the authorities be successfully contended that that in itself was a warlike operation: *The Petersham* and *The Matiana*. (1)

(1) [1921] 1 A. C. 99.

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Lord Warrington of Clyffe.

It is admitted on both sides that the *Western Front* was and the *Clan Matheson* was not engaged in a warlike operation.

It is also in my opinion clear that from the moment the breakdown of the steering gear occurred—a matter of from two and a half to four minutes—before the collision—the collision was inevitable.

The question then is: What was the real or proximate cause of the loss? Was it the impact of the *Western Front* against the side of the *Clan Matheson* and that alone or was it the breakdown of the steering gear of the *Clan Matheson* rendering the collision inevitable?

In *Ionides* v. *Universal Marine Insurance Co.* (1) the main question was whether the hostile act of the Confederate authorities during the civil war in America in extinguishing a light on Cape Hatteras was the proximate cause of the stranding of a ship or whether the fact that the master was out of his reckoning was such proximate cause, and it was held that the latter was the proximate cause, although, if the light had not been extinguished, the stranding would probably not have happened. In giving judgment Erle C.J. gives some illustrations which are of value in the present case. A ship driven by an attempt at capture into an inhospitable bay and there driven ashore by the wind and lost. The attempt at capture would be the real and proximate cause, though the loss would not have happened but for the violence of the wind. In the converse case the ship succeeds in getting out of the bay but encounters a gale which she would not have encountered but for the delay and is lost. Here the proximate cause is the gale, though but for the attempt at capture it might not have been encountered.

So here the collision in a sense occurred, inasmuch as it became then inevitable, as soon as the steering gear of the *Clan Matheson* broke down, and I think this misfortune should be regarded as the real and proximate cause of the loss, though the loss would not have occurred had not the *Western Front* been in the position in which she in fact was.

(1) 14 C. B. (N. S.) 259, 286.

I desire to express agreement with and to adopt the remarks of Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co.* (1) (the case of *The Warilda*): "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation." In my opinion these remarks apply equally where it is proved, as I think it is in this case, that the collision was caused by the failure of the ship to obey the will of the officer. For these reasons I think that I am justified in coming to the conclusion that the judgments of Wright J. and Scrutton and Lawrence L.JJ. are correct and that this appeal fails and ought to be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 16, 1929.

Solicitors for the appellants: *Ince, Colt, Ince & Roscoe.*
Solicitor for the respondents: *The Solicitor, Board of Trade.*

(1) [1923] A. C. 292, 305.

[HOUSE OF LORDS.]

H. L. (E.)* BOARD OF TRADE . . . . . APPELLANTS;

1929 AND

June 14. HAIN STEAMSHIP COMPANY, LIMITED RESPONDENTS.

Shipping—Charterparty T.99—Requisitioned Vessel—Collision—War or Marine Risk—Consequence of "warlike operations"—Mine Planter, with Mines on Board, proceeding after Armistice to United States—Both Vessels to blame.

Shortly after the Armistice the *Trevanion* collided in the North Atlantic with the *Roanoke* and was seriously damaged. At the time of the collision the *Trevanion*, being then under requisition to the Government upon the terms of a charterparty by which the Admiralty was not to be liable for sea risks, but was to be liable for all consequences of hostilities or warlike operations, was proceeding from the United States to England laden with a cargo of oats; the *Roanoke*, a vessel employed by the United States Navy as a mine planter and officered and manned by a crew of that Navy, was proceeding from England to the United States with 720 mines on board belonging to the United States Navy, but with no other cargo and no passengers. The collision was caused by the negligent navigation of both vessels, both being equally to blame.

A claim by the owners of the *Trevanion* against the Crown for the damage she had sustained having been referred to arbitration:—

Held, (1.) that it was open to the arbitrator to find that the collision was a consequence of a warlike operation; (2.) that the negligence of the *Trevanion* did not prevent her owners from being entitled to recover.

Decision of the Court of Appeal [1928] 2 K. B. 534 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J. made upon an award stated in the form of a special case.

The question raised by the appeal was whether in the circumstances of the case the loss sustained by the respondents by reason of the damage suffered by their steamship *Trevanion* in a collision in the North Atlantic with the steamship *Roanoke* on December 25, 1918, was a consequence of hostilities or warlike operations within the meaning of cl. 19 of Charterparty T.99 or arose out of a sea risk within the meaning of cl. 18 thereof.

* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE, and LORD ATKIN.

(1) [1928] 2 K. B. 534.

The arbitrator decided that the collision was a consequence of a warlike operation and, subject to the opinion of the Court, awarded that the respondents should recover from the Crown the cost of repairing the damage suffered by the *Trevanion* by reason of the collision.

Rowlatt J. held that at the time of the collision the *Roanoke* was not engaged in a warlike operation and that the award was not correct in law.

The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) set aside the order of Rowlatt J. and upheld the award.

The facts are stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of Lord Buckmaster, and they are summarized in the headnote.

1929. April 25. *Sir Thomas Inskip A.-G.* and *Sir Boyd Merriman S.-G.* (with them *Russell Davies*) for the appellants. (1.) There was here no evidence upon which the arbitrator could find that at the time of the collision the *Roanoke* was engaged in a warlike operation. Even in war time it is not enough for a claimant under cl. 19 of Charterparty T.99 to show that the ship alleged to be engaged in a warlike operation is a war ship; he must go on to show what she was about; a fortiori at a time when hostilities have been suspended. It is essential to allege and prove some circumstances showing that at the time of the collision the ship was engaged in a warlike operation; but here the circumstances are purely neutral. There is no evidence showing the purposes for which the mines were being carried to the United States. Collision at sea is prima facie a sea risk and the respondents cannot recover unless they establish affirmatively that this collision was the direct and proximate consequence of a warlike operation. That onus they have failed to discharge: *Britain Steamship Co.* v. *The King* (*The Petersham*); *Green* v. *British India Steam Navigation Co.*; *British India Steam Navigation Co.* v. *Liverpool and London War Risks Insurance Association* (*The Matiana*) (1); *Liverpool and London War Risks Insurance Association* v. *Marine Underwriters of S.S. Richard*

(1) [1921] 1 A. C. 99, 113, 129, 134.

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de Larrinaga (1); *Commonwealth Shipping Representative* v. *P. & O. Branch Service* (*The Geelong*). (2)

(2.) The negligence of the *Trevanion* prevented this collision from being a consequence of a warlike operation. The war risk, assuming it to have operated at all, was not the cause of the collision. The arbitrator has found that the collision was caused by the negligence of both vessels. That means that without the negligence of the *Trevanion* there would have been no collision, and if the collision is caused by the action of the peaceful ship that is not the consequence of a warlike operation. The *Trevanion* cannot recover for a loss for which her action was a part of the cause. This collision was not the consequence of a warlike operation, which was one of two factors of which the cause was composed. *Reischer* v. *Borwick* (3) is an authority for the proposition that if a cause included in a policy has begun to operate and is always operating the fact that some other cause contributed to the collision is not sufficient to prevent the original cause being the proximate cause. But this is a case of a composite set of facts which together make the cause and is not affected by *Reischer* v. *Borwick*. (3) It cannot be said that the collision was caused by one fact instead of being caused by all the facts. [They also referred to *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (4); *P. Samuel & Co.* v. *Dumas* (5); *Ionides* v. *Universal Marine Insurance Co.* (6)]

Dunlop K.C. (with him *Balloch*) for the respondents. The finding of the arbitrator that the *Roanoke* at the time in question was performing a warlike operation and that the collision was a consequence of warlike operations is conclusive. For the purposes of insurance this House is not concerned with the question whether either or both ships were negligent, but is only concerned with what they did. The impact was caused by the action of the *Roanoke* in altering her course. There is no finding that the accident would not have happened if the *Trevanion* had kept a proper lookout and

(1) [1921] 2 A. C. 141, 151, 153, 156.
(2) [1923] A. C. 191, 198, 206, 209.
(3) [1894] 2 Q. B. 548.
(4) [1918] A. C. 350.
(5) [1924] A. C. 431.
(6) (1863) 14 C. B. (N. S.) 259.

had sufficiently ported. The *Roanoke* did not keep her course and the *Trevanion* did not port sufficiently. Contributory negligence on the part of the *Trevanion* is no answer to the respondents' claim. Negligence is not a cause, but is merely a quality attaching to a particular act or a particular omission. In determining whether a collision is a consequence of a warlike operation negligent navigation of either or both vessels is irrelevant.

Sir Boyd Merriman S.-G. added nothing in reply.

The House took time for consideration.

June 14. LORD BUCKMASTER. My Lords, at about 8.20 P.M. on December 25, 1918, the steamship *Trevanion* collided in the North Atlantic with the steamship *Roanoke* and suffered damage by which she was disabled for ninety-nine days. The *Trevanion* was at the date of the collision under requisition to His Majesty's Government upon the terms of the charterparty, which under the reference of T.99 has become familiar to the Courts. The *Roanoke* was in the possession and control of the United States of America and was employed by the United States Navy as a mine planter, officered by officers of the United States Navy and manned by a United States Navy crew. At the time of the collision the *Trevanion* was on a voyage from New York to Portland laden with a cargo of oats and the *Roanoke* was proceeding from Portland to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department of the United States of America, she was carrying no other cargo and no passengers. The collision was due to the joint negligence of both vessels and both were equally to blame.

The consequent dispute as to liability was referred to arbitration and the arbitrator found that the *Roanoke* was at the time in question performing a warlike operation and that the collision was a consequence of hostilities, or warlike operations. Rowlatt J., on appeal, disagreed with this view but his judgment was reversed by the Court of Appeal.

The terms of the charterparty, the rights under which are in issue, need only a brief reference. Clause 18 exempts the Admiralty from liability if the ship be lost, among other

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things, "by collision . . . . or any other cause arising as a sea risk," but by cl. 19 the Admiralty themselves undertake the risks excluded from an ordinary insurance policy of marine insurance under the following clause: "Warranted . . . . from all consequences of hostilities or warlike operations whether before or after declaration of war." Upon those clauses it is only necessary to make this comment: that, in my opinion, taken together they provide a complete insurance against all loss arising as a sea risk, all that is excepted from the general clause being undertaken by the Admiralty. If, therefore, the Admiralty had been the marine insurer the result would have been that the ship would have had the benefit of a complete insurance policy of marine insurance without any of the exclusions referred to in cl. 19.

The first question that arises, therefore, is whether the collision was a consequence of hostilities or warlike operations and the second, if this be so, whether the fact of the negligence of the *Trevanion* prevents her owners from being entitled to recover. The first point appears to me to be one upon which it is possible that different views might reasonably be held. In December of 1918 the Armistice had been declared and had been existing for some six weeks, and it provided by art. 20 that there should be an immediate cessation of hostilities at sea, so that loss as a consequence of hostilities, meaning as I think it does existing hostilities, is negatived.

The war, however, had not ended and, however improbable it may have been, it was quite possible that it could at any moment have been revived and it is certain that the position must be regarded in the light of that possibility. The *Roanoke* was sailing into peaceful waters with a cargo of mines, for what purpose is not stated, and these considerations point to my mind to the conclusion that she was not engaged in a warlike operation, but it is clear that there were other matters upon which the learned arbitrator might take the opposite view. It is essentially a question of fact, and I am not prepared to disturb his finding.

The remaining question can be shortly dealt with. This House has decided that, if a vessel is engaged on warlike

operations and none the less by its negligence collides with another vessel, the negligence does not prevent the collision being the result of warlike operations: see *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*). (1) It is neither necessary nor fitting to discuss or examine the grounds of that judgment, for the law upon this point is authoritative and clear. It follows, therefore, that the negligence of the *Roanoke* does not prevent this collision from being the result of warlike operations. Does then the negligence of the *Trevanion* produce that result? In my opinion it does not. I think the case of *Reischer* v. *Borwick* (2), approved by this House in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (3), shows that it is no answer to a claim under a policy that covers one cause of a loss that the loss was also due to another cause that was not so covered. It follows from that that the claim made against the *Roanoke*, which, if it stood alone, would have been covered by the policy, is not the less covered because the *Trevanion* also contributed to the accident.

For these reasons I think the appeal should be dismissed.

VISCOUNT DUNEDIN. My Lords, I concur.

VISCOUNT SUMNER. My Lords, in para. 9 of his award the learned arbitrator says " if, and in so far as it is a question of fact, I find, and if and in so far as it is a question of law, I hold (subject to the opinion of the Court) that the *Roanoke* at the time in question, was performing a warlike operation and that the collision was a consequence of hostilities or warlike operations " and your Lordships have to decide in this appeal whether he was right. I think he was.

Though the Armistice had been signed and, having been renewed, was still current, war was not over nor was the renewal of war by any means out of the question. Except in so far as her destination may make the difference, the *Roanoke* was apparently doing what would have been one of her ordinary duties flagrante bello, and, if she had been proceeding to her station off the coast of Germany, I do not

(1) [1923] A. C. 292. (2) [1894] 2 Q. B. 548.
(3) [1918] A. C. 350.

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think it could have been argued, in view of the authorities, that her voyage so made was not a warlike operation. The temporary cessation of hostilities, which is all that an armistice in itself involves, could not deprive the operation of that character.

The appellants' proposition was that it is not enough to prove what the *Roanoke* was, unless it is also shown what she was doing. I recognize the high importance of considering the ship's errand and the purpose of her voyage, but I should have thought that, having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing as a lamb, unless of course some circumstances of ovine behaviour happened to be apparent. In truth the contention that the operation was not warlike, in other words that under the circumstances, whatever it was like, it was in truth peaceful, is founded mainly on the *Roanoke's* destination, and partly, I think, on what is now knowledge but then was only hope, that hostilities were actually over. Your Lordships were not much troubled with the question whether this matter was one of fact or of law; the point really urged was that there is no presumption here one way or the other as to the purpose of this voyage; that its character depends on its purpose; and that for the purpose nothing short of affirmative proof will do. Had the vessel not been a regularly commissioned ship of war of the United States Navy this might well be so, but that is what she was in fact—namely, a "mine planter," with 720 mines on board, ready, and, for all we know, waiting, to be "planted." We have no right in law or in fact to assume without evidence that such a ship is not engaged on the duty, for the purpose of which she forms part of the Navy to which she belongs, and the mere fact that we do not know why she was sailing away from the ordinary area of hostilities with objects unknown does not establish such a conclusion, however ample the scope for speculation may be. It is not for us to presume to know all the purposes of the naval authorities of the United States at that time. In the absence of knowledge I think that the arbitrator committed no error

of law in presuming that the purpose of her voyage was such as to consist with her general warlike character, and in the like absence I think it would be useless for me to estimate the chance of her mission being of one kind rather than of another. This is a stronger case than that of a man-of-war returning to her home port still equipped with her permanent armament. Live mines, I hope one may be justified in saying, are not generally supposed to be things either required in time of peace or convenient for storage at home against the next war, nor do they constitute so safe a cargo as to tempt any prudent authority to keep them on hand if they are no longer wanted and, in so far as this was a question of fact, I think that the learned arbitrator was entitled, if he was so minded, to say so.

It was argued, though I do not think that this question was submitted by the special case, that the collision here was not a risk taken by the Admiralty under charter form T.99, because cl. 18 excepts "collision." I think this reasoning is fallacious. Each ship ran into the other and, as the award finds, the collision "was caused by the negligent navigation of both vessels" and "both were equally to blame." For the purposes of an insurer's liability this means that the loss—whichever ship is regarded as the sufferer—was the result of two causes, jointly and simultaneously in operation—for the *Roanoke* ran into the *Trevanion* and the *Trevanion* ran into the *Roanoke*. If the respondents had claimed indemnity for this from Lloyds' underwriters the answer would have been "this loss, which is a collision loss, is one loss, the product of two causes, joint and simultaneous—namely, the eccentric courses steered by the two vessels. The whole voyage of the *Roanoke*, and therefore this part of it, was a warlike operation, and from losses so caused this policy is warranted free. Neither in law nor in fact is this collision and its resulting damage apportionable—hence no part of it can fall on this policy." This defence would have succeeded and, under cl. 19 of Charterparty T.99, this, coupled with proof that the *Roanoke's* voyage truly was a warlike operation, would have brought the case within

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the cover given by the Admiralty. Clause 18 must not be read so as to eviscerate cl. 19; both stand together. I think cl. 18 only excludes such collisions as do not otherwise come under cl. 19 as being both excluded by the ordinary f.c. & s. clause and also caused by a warlike operation. Accordingly, my Lords, I think that the appeal fails.

LORD WARRINGTON OF CLYFFE. My Lords, on December 25, 1918, the respondents' steamship *Trevanion* came into collision in the North Atlantic with the steamship *Roanoke* and suffered considerable damage. The *Trevanion* was at the time of the collision under requisition to H.M. Government upon the terms of the pro forma charterparty known as T.99.

The question in this appeal is whether the damage sustained by the *Trevanion* was a consequence of warlike operations within the meaning of cl. 19 of the charterparty.

The question was in the first instance referred to Mr. Raeburn K.C., who stated his award in the form of a special case. He held that on the facts found or admitted the collision was a consequence of warlike operations. This decision was reversed by Rowlatt J., whose judgment was in turn reversed by the Court of Appeal. Hence this appeal.

At the date of the collision the Armistice, concluded on November 11, 1918, was in force. Under its terms hostilities at sea were suspended, but the existing blockade conditions were to remain unchanged.

It is common ground that the *Trevanion* was not engaged in a warlike operation. She was on a voyage from New York to Portland. At the time of the collision she was exhibiting the regulation lights but not the optional masthead light.

The following are the findings of the arbitrator on which the question turns:—

"5. The steamship *Roanoke* at the time in question was in the possession and control of the United States of America under a bare boat charter. During the period from June 25, 1918, to January 25, 1919, she was employed by the United States of America solely for naval purposes as a regularly commissioned mine planter of the United States Navy,

operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States Navy crew.

"At the time of the collision with the *Trevanion* the *Roanoke*, under her aforesaid public employment, and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Va., with 720 mines on board belonging to the Navy Department of the United States of America and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me as to the circumstances under or the purposes for which the mines in question were being carried.

"6. Having carefully considered the evidence as to the said collision, I find that it was caused by the negligent navigation of both vessels and that both were equally to blame. The said negligence consisted in a bad lookout on both, insufficient porting by the *Trevanion* and failure to keep her course on the part of the *Roanoke*."

The appellants contended: (1.) That the fact of the collision occurring during suspension of hostilities of itself prevented it from being a warlike operation; (2.) that even if this fact was insufficient the absence of any evidence as to the circumstances under and the purposes for which the mines were being carried rendered it impossible properly to find that the *Roanoke* was engaged on a warlike operation; (3.) that the negligence of those on the *Trevanion* prevented the collision from being a consequence of warlike operations.

As to the first of these contentions, I agree with the arbitrator and the Court of Appeal. Hostilities were suspended but the war was not at an end, and in my opinion it was open to the arbitrator to hold that, notwithstanding the suspension of hostilities, the voyage of the *Roanoke* under the circumstances found by him was a warlike operation.

As to the second, the arbitrator has found that during the period including the day of the collision the *Roanoke* was employed solely for naval purposes as a regularly commissioned mine planter carrying a large cargo of mines. In a state of war that fact is in my opinion enough to constitute

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her voyage a warlike operation. It could not be denied that on the voyage out she was engaged in such an operation and, in the absence of evidence to the contrary, the same quality must in my opinion attach to the remainder of her voyage. Supposing the impact of the collision had exploded the mines or some of them causing further damage, it would have surely been impossible to contend that this was not a consequence of a warlike operation, yet the mere accident of the explosion would not alter the nature of the voyage.

As to the third contention I think the point is concluded by the decision of this House in *Attorney-General* v. *Adelaide Steamship Co.* (the case of the *Warilda*). (1) It was there held that the negligence of the warship did not prevent the collision being a consequence of warlike operations. If this is so how can the negligence of the other ship contributing, but only contributing, to the collision have that effect ? On the finding of the arbitrator it is impossible to say that the negligence of either ship by itself was the proximate cause of the collision.

This case is clearly distinguishable from that of *The Clan Matheson* (2) recently decided in your Lordships' House, in which it was held that the proximate cause of the collision was the breaking down of the steering gear of the merchant vessel, rendering the collision inevitable from the moment it occurred.

I agree that the appeal fails and must be dismissed.

LORD ATKIN. My Lords, I agree with the judgment which has been delivered by my noble and learned friend, Lord Sumner, and have nothing to add.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 14, 1929.

Solicitor for the appellants : *The Solicitor, Board of Trade.*
Solicitors for the respondents : *Thomas Cooper & Co.*

(1) [1923] A. C. 292. (2) Ante, p. 514.

[HOUSE OF LORDS.]

FRENKEL . . . . . APPELLANT; H. L. (E.)*

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MACANDREWS AND COMPANY, LIMITED . . . . . RESPONDENTS. March 11.

Shipping—Bill of Lading—Construction—Contract Voyage—Deviation—Parol Evidence—Admissibility—Alternative Routes.

A bill of lading issued at Malaga stated that goods were shipped by the appellant "in the steamship *Cervantes* with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation; . . . . to discharge, reload, tranship, send to destination by any means of transport, all responsibility of the ship ceasing on discharge from deck." The respondents owned a fleet of cargo steamers, including the *Cervantes*, which were in the habit of going from Liverpool to the ports of Spain and Portugal and back. The ships called at Malaga in some cases, as in the present, on the outward journey before proceeding up the east coast of Spain, and in other cases on the return journey; and the route of any particular ship was advertised in the local papers at Malaga, stating that the voyage was "via Levante" or "Directo" according as the ship was going up the Mediterranean before going to Liverpool or going to Liverpool direct. The appellant's goods were lost in a storm between Malaga and Cartagena.

In an action to recover the value of the goods:—

Held, that, in the absence of any express statement in the bill of lading of the ship's contract voyage, parol evidence was admissible to show what that voyage was, and that in the circumstances the route via Levante was a usual commercial route for the ship to follow; that she was therefore on the contract voyage at the time when the goods were lost, and that the respondents were protected from liability by the exceptions in the bill of lading, which included perils of the sea.

Leduc v. *Ward* (1888) 20 Q. B. D. 475 and *Margetson* v. *Glynn* [1892] 1 Q. B. 337; [1893] A. C. 351 distinguished.

Evans, Sons & Co. v. *Cunard Steamship Co.* (1902) 18 Times L. R. 374 followed.

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt J.

The appellant shipped 134 barrels of olive oil on the respondents' steamship *Cervantes* at Malaga under two bills of lading, with destination in one case to Liverpool and in

* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

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the other to Bradford. The oil was lost in a storm at sea between Malaga and Cartagena.

The appellant sued the respondents for the value of the oil. The respondents pleaded that they were protected from liability by the exceptions in the bills of lading, which included perils and risks of the seas.

The appellant replied that the *Cervantes* without justification deviated from the bill of lading voyage, and that the respondents were therefore not entitled to rely on the exceptions in the bills of lading.

The facts are stated in the judgment of Lord Buckmaster and are summarized in the headnote.

Rowlatt J. decided that the *Cervantes*, by sailing eastwards from Malaga to load or discharge cargo at various Mediterranean ports before proceeding to Liverpool, had deviated from the agreed voyage in a way which was not justified by the bills of lading. He therefore gave judgment for the appellant.

The Court of Appeal (Scrutton, Greer and Sankey L.JJ.) held that the *Cervantes* was proceeding on the agreed voyage and gave judgment for the respondents.

1929. Jan. 31; Feb. 1. *Dunlop K.C.* and *Harold Stranger* for the appellant. It was not open to the Court of Appeal to find that there was here a collateral agreement outside the bills of lading. The bills of lading contained all the terms of the contract of carriage and evidence was not admissible to vary the terms by reading into them the words "Via Levante": *Fraser* v. *Telegraph Construction Co.* (1); *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2); *Glyn, Mills & Co.* v. *East and West India Dock Co.* (3); *Royal Exchange Shipping Co.* v. *Dixon* (4); *The Delaware* (5); *St. Johns N. F. Shipping Corporation* v. *S. A. Companhia Geral Commercial Do Rio de Janeiro* (6); *Rosenberg Brothers & Co.* v. *United States Shipping Board Emergency Fleet Corporation* (7); Carver's Carriage

(1) (1872) L. R. 7 Q. B. 566, 571.
(2) (1883) 10 Q. B. D. 521, 528.
(3) (1882) 7 App. Cas. 591, 596.
(4) (1886) 12 App. Cas. 11.
(5) (1871) 81 U. S. 579.
(6) (1923) 263 U. S. 119.
(7) (1925) 7 Fed. Rep. (2nd Ser.) 893.

by Sea, 7th ed., § 56. There is no ambiguity in the bills of lading and the voyage was clearly designated. That voyage was from Malaga to Liverpool by the ordinary geographical route subject to the limited liberty to deviate given by the deviation clause : *Leduc* v. *Ward* (1) ; *Margetson* v. *Glynn*. (2) At the time of the loss of the goods the ship was not upon the agreed route and was not within the liberty to deviate. The bills of lading did not give the respondents an option to carry the goods in an opposite direction. The deviation clause allows the ship to go to the right or the left of a line drawn on the route between Malaga and Liverpool but it has no application where the vessel starts off the route : *Duche & Sons* v. *Owners of S.S. Maria*. (3) *Evans, Sons & Co.* v. *Cunard Steamship Co.* (4), unless distinguishable, was wrongly decided. The fact that the appellant was aware of the route taken by the *Cervantes*, assuming it to be proved, is immaterial, for the contract is expressed in the bill of lading and indorsees are in the same position as the shipper : *Cox* v. *Bruce*. (5)

[They also referred to Arnould on Marine Insurance, 11th ed., § 376 ; *Redman* v. *London*. (6)]

Clement Davies K.C. (with him *Cyril Miller*) for the respondents. 1. The first question is what is the agreement shown in the bills of lading. It is said that the route there referred to means the direct geographical route, but upon the form of these bills of lading there is no such clear designation of the route as to render parol evidence inadmissible ; and if parol evidence is required to show what route was intended, then it is clearly established that the route taken by the *Cervantes* on this occasion was a usual customary route by which this voyage had been for many years performed by vessels of the respondents' line. What is the agreed voyage must be determined in the light of commercial custom as well as by considerations of geography : *Evans, Sons & Co.* v. *Cunard Steamship Co.* (4) ; *James Morrison & Co.* v. *Shaw*,

(1) 20 Q. B. D. 475.
(2) [1892] 1 Q. B. 337, 340 ; [1893] A. C. 351, 354.
(3) (1920) 3 Ll. List Rep. 184.
(4) 18 Times L. R. 374.
(5) (1886) 18 Q. B. D. 147.
(6) (1813) 3 Camp. 503.

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Savill and Albion Co. (1); Scrutton on Charterparties and Bills of Lading, 12th ed., p. 297; Arnould on Marine Insurance, 11th ed., §§ 390, 391. The *Cervantes* was therefore on the agreed route at the time of the loss and is protected by the exceptions in the bills of lading. In *Leduc* v. *Ward* (2) and *Margetson* v. *Glynn* (3) the words of the bill of lading were much more precise: "now lying at the port of —— and bound for ——," and in the latter case it was not contended that at the material time the vessel was upon her contract route, the only question being whether she was within the liberty to deviate. 2. Assuming that the *Cervantes* was not on the contract route at the time of the loss, the deviation was justified by the liberty granted by the bill of lading: *Hadji Ali Akbar* v. *Anglo-Arabian and Persian Steamship Co.* (4); *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha.* (5)

[He also contended that the appellant by his conduct was estopped from giving to the bills of lading any other meaning than that contended for by the respondents, but it was objected that the point was not raised by the pleadings and that the alleged representation was incapable of being formulated, and the House relieved the appellant's counsel from arguing this point.]

Harold Stranger in reply. Assuming that it is open to consider external circumstances "the route" in the bills of lading cannot mean one of two routes. As to deviation, the liberty to deviate does not authorize going outside the commercial object of the adventure: Carver's Carriage by Sea, §§ 285, 286.

The House took time for consideration.

March 11. LORD BUCKMASTER. My Lords, the appellant, who is a merchant at Malaga, on April 11, 1927, shipped twenty-four barrels of olive oil in the steamship *Cervantes*, one of a fleet of steamers owned by the respondents trading between Malaga and this country. The terms of the bill

(1) [1916] 2 K. B. 783, 795, 797. A. C. 351, 354.
(2) 20 Q. B. D. 475.
(3) [1892] 1 Q. B. 337, 340; [1893] A. C. 351, 354.
(4) (1906) 11 Com. Cas. 219.
(5) (1925) 7 Fed. Rep. (2nd Ser.) 889.

of lading are as follows: "Shipped by Leon Frenkel in the steamship *Cervantes*, with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route without it being considered a deviation; to enter and leave ports without pilot; to assist and tow vessels in any circumstances; to discharge, reload, tranship, send to destination by any means of transport, all responsibility of the ship ceasing on discharge from deck."

The ship proceeded to Cartagena and thence to a series of other ports on the Mediterranean coast, reaching as far as Palamos, close to France, and she then returned, calling at various ports on her way, but not calling again at Malaga, and so to Liverpool. Between Malaga and Cartagena she encountered heavy weather, with the result that the barrels of oil were sprung and the oil was lost, whereupon these proceedings were instituted by the shipper, claiming damages for the loss. He alleged originally that the ship was not seaworthy, but that point has been disposed of adversely to him and is no longer supported. The real question in the case is whether or no it was a deviation from the route which the bill of lading did not permit, to call at Cartagena, since if that were so the fact that the oil was lost in the course of that journey would entitle plaintiff to the remedy he seeks.

The respondents, however, allege that in the circumstances of the case the route authorized by the bill of lading was that in pursuance of which they proceeded up the Mediterranean Coast and that to call at Cartagena was well within the permission of the deviation clause.

The point is important. A bill of lading, like every other contract, must be construed in relation to the circumstances in which it was entered into and the respondents say that in the present case those circumstances include the practice of the sailings of their vessels, which was well known to the appellant.

The facts clearly establish that such practice was this. The respondents' steamers are in the habit of going from Liverpool up the Mediterranean coast, picking up a cargo

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from port to port, either as they journey up or journey down, and then returning to Liverpool. In certain cases they call at Malaga after they have called at the Mediterranean ports. In other cases, as in the present, they call at Malaga first and then pursue their way to the other ports. The distinction between the two routes is well known and is covered by advertisements issued in the local papers at Malaga, stating that the voyage of any particular vessel is either " via Levante " or " Directo," according as they are proceeding up the Mediterranean before going to Liverpool or going to Liverpool direct. This information is also contained on their shipping cards, and although there is no proof that the plaintiff himself was actually informed upon the point, since he was not at Malaga when the cargo was shipped, there is no doubt that the information was in the possession of his agents and that when they shipped the oil they did so in a steamer which they knew was going to Liverpool " via Levante " and not direct. It is impossible to say, in these circumstances, that there is any definite customary route. The customary route is one of two routes, and the figures showed, as to the different voyages, that the one was nearly as customary as the other. The bill of lading does not in terms say the ship was lying at Malaga or was bound for Liverpool, but that Liverpool was her destination, and, as far as that is concerned, that destination is consistent with either of the two courses being pursued.

If, notwithstanding these facts, the fair construction of the bill of lading is that the route was direct to Liverpool, the appellant would be entitled to succeed, for an agreed term in a bill of lading must prevail over an agreement contrary to its terms. The true remedy in such a case is rectification of the documents, and no such claim is made here. The appellant contends that the authorities conclude the matter of construction in his favour, and of these the most important are *Leduc* v. *Ward* (1) and *Margetson* v. *Glynn*. (2) In the former case goods were shipped for delivery at Dunkirk on

(1) 20 Q. B. D. 475, 481, 484.

(2) [1892] 1 Q. B. 337; [1893] A. C. 351.

a vessel lying at Fiume and bound for Dunkirk with liberty to call at any ports in any order. Instead of proceeding direct for Dunkirk, the vessel sailed for Glasgow and was lost off the mouth of the Clyde. Proceedings were taken by indorsees of the bill against the shipowners for non-delivery of the goods. The bill of lading was in the usual form and Lord Esher points out that such a form provides for a particular voyage, and that unless it does so it would be impossible for the owner of the goods to know at what time he could calculate on their receipt. He continues: "It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined." And further he adds that "if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from one place to the other." Fry L.J. speaks in the same terms. In his judgment there is contained the following important passage: "It is said that there is an American authority which shows that notice to the shipper of the route by which the ship is going to sail will rebut what is said to be an implied term of the contract, viz., that the vessel will proceed by the direct route to the port of destination. In the first place it should be observed that this seems to have been a mere obiter dictum; but assuming that, apart from the Bills of Lading Act, such notice would have had any such effect, which I am far from saying, I think it impossible, having regard to the provisions of that Act, to suppose that any effect could be produced by such notice to the shipper with respect to a contract by bill of lading which is by statute made assignable to a third person; for to hold that it could have such effect would be to hinder that assignability of the contract which the legislature designed to effectuate." The words in that case, however, differ from those in the present. There is a marked distinction between a vessel lying at one port and being bound for another and a vessel having an ultimate destination, which as far as the goods are concerned, might be either a port or an inland town.

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The case of *Margetson* v. *Glynn* (1) is a decision to the same effect. In that case the goods and the terms of the bill of lading provided that the goods were shipped on the steamship *Zeta* "now lying in the port of Malaga bound for Liverpool with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coal, cargo or passengers or for any other purpose whatsoever." The oranges were shipped at Malaga and the ship instead of going to Liverpool direct went to Burriana on the north-east coast of Spain and then back again and proceeded to Liverpool. As a consequence of the delay thus caused, the oranges were rotten. Lord Esher says: "The voyage described is from Malaga to Liverpool, and, if there were nothing else in the bill of lading, the ship would be bound to go from Malaga to Liverpool, according to the ordinary sea course for a steamer from the former port to the latter." And he then says that the liberty to deviate "is a liberty with regard to that voyage. It is not liberty to go another voyage, but . . . . to call at those ports which are on the course of the voyage, although not exactly the sea course which the ship would take." Fry and Bowen L.JJ. agreed with this judgment and neither there nor in the House of Lords was any serious doubt raised as to the meaning of the voyage that was contracted for in the bill of lading, although the practice of vessels to coast along the Mediterranean was referred to both in the arguments and in the judgments. So far as the principle laid down in these cases is concerned it is, to my mind, this, that the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route and the circumstance of knowledge that it was not or might not be direct will not affect that construction. That this doctrine is confined within these strict limits is shown in the case of *Evans, Sons & Co.* v. *Cunard Steamship Co.* (2) In that case oil was shipped at Bari in the Adriatic to be delivered

(1) [1892] 1 Q. B. 337, 339, 340; [1893] A. C. 351.
(2) 18 Times L. R. 374.

at Liverpool. The bill of lading provided that the ship was at liberty to proceed to her port of destination, first turning to or staying in any port or ports in order, in a variety of named places, including the Black Sea, the Levant, the Adriatic and the Mediterranean, in any order of rotation and whether in or out of the customary or advertised routes without the same being a deviation. The vessel instead of proceeding direct to Liverpool completed her voyage by proceeding to Fiume and other Adriatic ports and thence to Constantinople. The heat caused the casks to leak and the oil was lost. Wills J. said that the evidence showed that the only practical way to get a cargo from Bari to London was by the Adriatic round by the Levantine or Black Sea Ports, and that that was in fact the agreed voyage and that Constantinople was on the customary route. He accordingly held that the deviation clause applied.

In the Federal Courts there are two cases reported in the 2nd Series of the Federal Reports for the year 1925: *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha* (1) and *Rosenberg Brothers & Co.* v. *United States Shipping Board E. F. Corp.* (2)

In the first of these cases goods were shipped from Antofagasta to Honolulu. The ship proceeded to San Francisco and thence to Portland and after leaving Portland she was destroyed by fire and the cargo lost. It was stated that this was a deviation of her proper course and that the usual and customary route from the nitrate ports to Honolulu was northerly to San Francisco. The shipowners answered that the particular route was well known to the shippers when the goods were shipped. It was held that the deviation was permitted, but the foundation of the judgment appears to be this: that the customary route had been changed to the knowledge of the shipper and that, therefore, the presumption that the old route was the right one could not be followed. Whether that case be accurately decided according to our law or not, it is not necessary to consider, for it is not the present case.

(1) 7 Fed. Rep. (2nd Ser.) 889. (2) 7 Fed. Rep. (2nd Ser.) 893.

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In the second case where it was held that the deviation clause was not a protection, the learned judge said that the rule was that a deviation course must be considered in reference to a particular voyage between the ports of departure and the destination named in a bill of lading and to have no application to any port or ports not only and usually ports of call on the proposed voyage. This does not assist the present case, where there was not a port of departure and a port of destination so named in the bill of lading, for the place of departure is not mentioned, the word Malaga only occurring in the following connection: "The Master or Agent signs 2 Bills of Lading of one same tenor; one being accomplished the other to stand void and of no effect. Malaga, 11th April, 1927." Nor is there a customary route, but one of two routes, either of which might be taken, and this is left open on the bill of lading which would cover either route. So far as the original parties to the bill of lading are concerned the actual route was well known while as to third parties the form of the bill of lading made it necessary for them to ascertain, as they readily could, which route in fact the goods would travel, for either was included in the bill of lading.

There is no need in these circumstances to examine the effect of the deviation clause, since if, as I think, the route covered by the bill of lading was via Levante the question does not arise.

For these reasons I think this appeal should fail.

VISCOUNT DUNEDIN. My Lords, notwithstanding the personally testified ignorance of the appellant, I am completely convinced that those who were acting for the appellant and with his authority at Malaga knew perfectly well that the route to be taken by the *Cervantes* was to proceed up the coast of Spain, and then to turn back to the Straits of Gibraltar, and so on to Liverpool. The regular custom of the vessels of this line was to make a round voyage of the ports on the east side of Spain, and Malaga might be touched either on the outward or on the return journey.

The *Cervantes* on the occasion of the voyage in question was to touch at Malaga on the outward voyage and not on the return, so that if goods were to go by that ship, they must needs be taken by being carried eastward. On this occasion the *Cervantes* was on its usual route.

The bill of lading discloses these facts: (1.) That the ship is the *Cervantes*. (2.) That it is one of the ships belonging to the MacAndrews Line. (3.) That the destination of the goods is Liverpool, to which port they may be sent by any means of transport. The route of the ship is not specified, but is spoken of as "the route." There is also a deviation clause.

The appellant's argument is based on authority and on authority alone. He says it is settled especially by the cases of *Leduc* (1) and of *Glynn* (2); that the route means the direct geographical route from Malaga to Liverpool and that the deviation clause is of no value to sanction going to a port which, so far from being on that route, is in a contrary direction. It may be at once conceded that these cases had settled that the respondents could not get any assistance from the deviation clause. If the vessel was not on what is termed "the route" in the bill of lading, the deviation clause will not help him. It is, therefore, necessary to see what was exactly decided by these two cases as to the route to be followed by a vessel.

In *Leduc's* case (1) the bill of lading was as follows: "Shipped . . . . on the steamship *Austria*, now lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order . . . . to be delivered . . . . at the aforesaid port of Dunkirk," etc. The ship proceeded to go to Glasgow, and was lost off the Ailsa Craig just before she got there. It was not pretended that the ship was on its proper route. The whole argument turned on the expression "with liberty to call at any ports in any order." It was pointed out that the argument of the ship-owner would lead to a liberty to go to any port in the world. The Courts held that ports meant ports which could fairly

(1) 20 Q. B. D. 475. (2) [1892] 1 Q. B. 337; [1893] A. C. 351.

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be called ports on the route; that no one could suppose that the route from the Mediterranean to Dunkirk lay round the West of Scotland and that consequently being off the route, liberty to call at ports did not save the shipowner. The decision it is obvious, except in so far as the deviation clause is concerned, does not touch the present case, because in that case there was no question as to what was the route, and no averment that the vessel was on its route, while here there is. The real strength of the case for the appellant rests not in the decision, but on some of the expressions used by the learned judges. Lord Esher, after making it clear that the bill of lading contained the contract, to the terms of which contract the plaintiff as indorsee was entitled to appeal, goes on to point out that the contract must be for a particular voyage, because, unless it was so, business in general, and insurance business in particular, would be impossible. He then says (1): "The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with regard to the voyage so described? A bill of lading is a common mercantile document, which has been used for hundreds of years, and I think that business men and Courts of Law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other." There are several observations to be made on these remarks of the learned judge; not by way of criticism of the remarks themselves but on their proposed application to the facts of the present case. There is no statement here that the ship is lying at Malaga and bound for Liverpool. Obviously the ship was not necessarily bound for Liverpool because of the permission given to forward

(1) 20 Q. B. D. 481.

the goods to Liverpool by any other means of transport. Therefore the rigid result which Lord Esher draws from the words quoted cannot be sought in the present case. Then, as to the words, "the ordinary track by sea," I think these words must be construed secundum subjectam materiam. There was no question raised as to any but one route from Fiume to Dunkirk. It is, I think, clear that the words cannot be pressed to the extent that the only route is the shortest and most direct geographical route. There may be, in my view, either alternative routes or a customary route which in either case might displace the geographical route.

In *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1) the bill of lading bore Shipped on board the *Veria* "now lying in this port (the port of Bari on the Adriatic) bound for the port of Liverpool." The vessel proceeded on a round voyage for Constantinople. The defendants proved that the vessels of this line invariably called at Bari on the outward and not on the homeward voyage. Wills J. in giving judgment for the defendants said: "The description of the particular voyage agreed upon must be the keynote to which the bill of lading must conform. What then is meant by 'the voyage from Bari to Liverpool'? Lord Herschell says the expression must be understood in a business sense. In *Glynn* v. *Margetson* (2) there was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine or Black Sea ports." That case puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ship really was.

Many cases may be figured where there is more than one route which might be used by a ship. It might be a choice between the Suez Canal, the Panama Canal or round Cape Horn. In such a case even if the port of starting and of destination were stated, it would be necessary to make inquiry to find out which was the usual route.

(1) 18 Times L. R. 374. (2) [1893] A. C. 351.

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Then, as to custom, it is worth while noting how even Lord Esher, in *Leduc's* case (1), alludes to custom. He is speaking of an American case which had been quoted, and which was said to decide that the shipowner might be allowed to prove that the person to whom he gave the bill of lading knew that the ship was going on another voyage. Let it be remembered that the case before Lord Esher was the case of an indorsee. He then says: "If that is the effect of what the Court which decided the case said it was apparently said in a case where it was not necessary to decide the point, for it seems that there was proof of a custom to deviate which justified the deviation."

And in the case of *James Morrison & Co.* v. *Shaw, Savill and Albion Co.* (2) Lord Phillimore says: "It may be, if it is customary for the line to which the ship belongs, to the knowledge of the shipper, to touch at some intermediate port, not mentioned in the bill of lading, that touching at this port may be regarded as part of the customary course of navigation." The same case gives an illustration of alternative routes between the two same ports. The voyage was between a port in New Zealand and London, yet the course outward bound was by the Cape of Good Hope and homeward bound by Cape Horn. The deviation there was to a place which lay on neither route and so the decision followed *Leduc*. (3) I must particularize that when the knowledge of the shipper is spoken of I am so far only taking that as evidence of the customary route, not as a collateral agreement for deviation.

I come next to the case of *Glynn*. (4) The bill of lading there bore: "Shipped upon the S.S. *Zeta* now lying in the port of Malaga and bound for Liverpool," etc.

The appellant very naturally appeals to this case, because the place at which the goods were shipped was Malaga, as here, and the place of their ultimate destination was Liverpool, as here, but in that case there is not a vestige of averment that there is any customary route between Malaga and

(1) 20 Q. B. D. 475, 482.
(2) [1916] 2 K. B. 783, 797.
(3) 20 Q. B. D. 475.
(4) [1893] A. C. 351.

Liverpool, except the direct route. The expression "lying in" and "bound for" occurs, which brings it straight within Lord Esher's observations. The whole argument was based on the scope of the deviation clause.

I am accordingly of opinion that neither *Leduc* nor *Glynn* closes the door against the respondent. I think "the route" in the bill of lading means the customary route, and that by this line the regular customary route for a ship which touched at Malaga on the outward route of a round voyage was to continue eastward, as the *Cervantes* did. I think the respondents are entitled to show that by evidence, and that they have shown it; that consequently there was no deviation and the judgment of the Court of Appeal is right.

VISCOUNT SUMNER (read by LORD BUCKMASTER). My Lords, the question here is whether the shipowners have so deviated from the contracted voyage as to disentitle themselves to the protection of their excepted perils. The bills of lading now in suit are in Spanish with a few English clauses in the margin, but the English translation has been agreed and it is agreed also that they are governed by English law. The most material clause, divided into sections, is as follows: "Shipped by Leon Frenkel (1.) in the steamship *Cervantes* with destination to Liverpool (2.) with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation (3.) to enter and leave ports without pilot (4.) to tow and assist vessels in any circumstances (5) to discharge reload tranship send to destination by any means of transport (6.) all responsibility of the ship ceasing on discharge from deck (7) 24 barrels of olive oil."

This is how one bill of lading runs; the other was of identical tenor but the quantity was 110 barrels with destination Bradford. There is no statement, such as is common, of the port where the ship is lying or that she is "bound for" another port and, although the general structure is that of a transit, more or less indicated, with four liberties added, the sentence is not wholly or even mainly framed to

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describe a route with an optional variation of that route, which is nevertheless to be subordinate to it. I do not think that the rules of construction applicable to deviations would apply without modification to the liberties to tow and to tranship, and certainly they do not to the liberty to dispense with pilotage, yet all alike are uttered, so to speak, in one breath and to some extent at least appear to stand on the same footing.

Grammatically both the word " shipped " and the words " with destination to " refer to the barrels of oil as to which the statements in the sentence are made, and it is plain that in the case of the bill of lading for 110 barrels this is the substantial and not merely the formal construction. Further the words " tranship, send to destination " point to a destination of the goods for some place, to which the ship is not or may not be bound. Nothing expressly shows that this liberty is only to be exercisable when the ship herself is accidentally prevented from getting to the destination of the goods or to the termination of her own voyage as originally contemplated.

In the rest of the bill of lading the words " at destination " occur twice, and the words " port of destination " twice. I need only say that I think none of these phrases carry the words " with destination " Liverpool or Bradford, as the case may be, any further. Certainly they are not enough to show that the words " with destination Liverpool " are an expression of the terminus ad quem of the ship's voyage.

Each bill of lading bears the word " Malaga " just before a date, which is clearly the date when the master's signature, immediately following, was affixed. As a matter of construction I think " Malaga," so placed, means only the place where the bills of lading were signed and does not in itself also mean that Malaga is the place where the goods were shipped. For anything that the document says to the contrary shipment might have been at a neighbouring loading place, Torre del Mar for example. It happens not infrequently that goods are shipped in one place and signed for in another for reasons of business convenience, but if such be the fact

the voyage does not simply commence at the place where the bills of lading are signed. The matter is one for proof. Accordingly, in these bills of lading I think it is clear that the voyage is not stated in terms. It is easy to surmise from them what the voyage was to be; it is easier still to infer where the goods were probably laden and to what port it was expected that the *Cervantes* would carry them, but the bills of lading do not express the ship's contract voyage. Yet until a contract voyage is established, questions of deviation do not arise. Evidence was needed to prove what that voyage was and that evidence was tendered and was admitted without objection. Its effect was that the ship, having shipped the oil at Malaga, was to proceed "via Levante," calling at various ports as far eastward and north-eastward as Palamos, and, returning thence, calling at other ports, until, having passed Malaga without calling again, she proceeded "directo" for the United Kingdom. No question arises here as to the precise meaning of "via Levante" or as to the ports to be called at and the order of the calls, which that expression may connote. This was shown to be a usual commercial route for the *Cervantes* to follow under the circumstances and to be the route which had been advertised for her for this voyage some time beforehand, and it was one which I think was reasonable under the circumstances. I cannot see that it is the less a reasonable and usual commercial route, though the evidence referred only to the ships of the respondents' own line. Their prominent position in this trade, the number of ships they run, and the length of time that this kind of practice has been followed by them all go to prove this conclusion. The evidence further shows that these facts were well known to those of his employees, to whom the plaintiff confided this part of his business, and the usual and reasonable commercial character of such a voyage was thereby strongly confirmed, since no objection was taken. I do not consider that any estoppel or collateral agreement arose in consequence of this knowledge, so as to furnish a defence independently of the terms of the bills of lading, but this was not necessary.

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If a voyage via Levante became in fact the contract voyage, to which the contracts of carriage apply, or if, commercially, it was a due performance of whatever was agreed, the action fails, for the ship did not depart from a voyage so described and the bill of lading exceptions accordingly covered the loss sued for. At the Bar, however, it was contended that *Glynn* v. *Margetson* (1) bound your Lordships to find that there had been an unauthorized deviation and that the exceptions did not apply.

The authority of that case is unquestionable but the limits of the decision are also clear. The termini of the bill of lading voyage were expressly stated. The shipowner's claim was boldly made that a liberty to deviate, framed in almost universal terms, entirely overrode those limits and prevented what the ship actually did, or indeed almost anything else of the sort that the captain chose to do, from being an unauthorized deviation. The House decided that he was wrong and that the liberty did not cover the deviation, the principle being that these two parts of the bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled, and that a liberty, however generally worded, could not frustrate but must be subordinate to the described voyage. It follows that, as soon as it is established in the present case that the described voyage was not departed from, there is no need to resort to or to interpret the liberty to deviate at all. Reliance was, however, placed on various sentences in the judgments of Lord Herschell and Lord Esher, chiefly the latter, as authority for saying that, when the beginning and end of the voyage have been ascertained, the law would not permit an intermediate divagation of the ship in a direction opposite to that of the named destination, since that would contradict the description of the voyage, and even amount to an abandonment of it. I think that this is a misunderstanding of these judgments. They were of course directed to the case in hand and were not intended to lay down a general rule to fetter all freedom of contract between shippers and shipowners.

(1) [1893] A. C. 351.

It is additionally evident that this was so, because no material was before the House to show how far the exigencies of navigation and the usages of trade permit or require elasticity in the route, by which a ship is to reach her journey's end. It was indeed argued that all ships in the Mediterranean trade did as the *Zeta* had done, but, apart from suggestions to this effect made to, but not accepted by, the Spanish witnesses on commission, no evidence was given of the conditions of the voyage described and, except such as could be taken judicial notice of, the Court had no information. The deviation was one, which not only took the ship to Burriana, a long way to the East and North-East of Malaga, but one, of which every league had to be retraced, and this, with a cargo of ripe fruit, necessarily involved deviation consisting in the delay to proceed promptly towards the destination, apart altogether from the line of route. Both judgments endeavour to keep the door open to a certain measure of departure from the strict "sea-track" without its being considered a deviation. These expressions were not meant to state the limits of permissible departures but to indicate the kind of facts to be taken account of, when proved, with a view to the recognition of a liberty. Lord Herschell speaks of certain ports being in the way of the voyage "in a business sense." Lord Esher mentions various circumstances as to season and safety that may be material. It would have been enough for the decision to have said "Malaga to Liverpool is not Malaga to Burriana and back to Liverpool." The mention of other matters, all of them depending on facts relating to the circumstances of trade and navigation and varying somewhat as time goes on and progress takes place, really shows how clearly these great authorities desired to guard themselves in view of the fact, that on many grounds deviation from the sea-track might still not be beyond the ordinary route, though in the case in hand they had not been put in evidence. Such things must be matters of degree and may not always be equally important for all classes of ships, all kinds of cargo, or all periods of trade. In more recent years to sail in the direction

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opposite to that of the destination has been held not to have been a deviation from a named voyage, where it was commercially impracticable to do otherwise (*Evans, Sons & Co.* v. *Cunard Steamship Co.* (1)), a departure from the direct line from San Francisco to Honolulu by proceeding to Portland, Oregon, merely in order to earn a subsidy for the shipowner, has been held justifiable by usage in *Grace* v. *Toyo Kisen Kabushiki Kaisha* (2), and the fact that a general ship is seeking parcels at various ports in a gulf, the Persian Gulf, where she can find them, has been treated as being available to justify a departure from a named terminus under the authority of a wide deviation clause: *Hadgi Ali Akbar* v. *Anglo-Arabian and Persian Steamship Co.* (3)

The conclusion of the Court of Appeal, with which I concur, that the agreed voyage was one, which included the passage on which the oil was damaged, makes it unnecessary to discuss now the terms of the liberty to deviate and I will only say that, if, as I suppose is the case, parties may, if they can find apt words to do so, contract themselves even out of *Glynn* v. *Margetson* (4) and make the liberty to deviate control the terms of the described voyage, the words used here—namely, "at any ports whatsoever, although they may be outside the route," seem to go far, and possibly far enough, to achieve this object.

I think that the appeal should be dismissed.

LORD BUCKMASTER. My Lord Blanesburgh desires me to say that he agrees with that opinion.

LORD WARRINGTON OF CLYFFE (read by LORD ATKIN). My Lords, the appellant (the plaintiff in the action) shipped on board the defendants' ship *Cervantes* at Malaga 134 barrels of olive oil under two bills of lading with "destination" in one case to Liverpool and in the other to Bradford. The olive oil would not be properly described as perishable goods. The goods were lost at sea and the appellant sued the respondents for their value. The loss was covered by the

(1) 18 Times L. R. 374.
(2) 7 Fed. Rep. (2nd Ser.) 889.
(3) 11 Com. Cas. 219.
(4) [1893] A. C. 351.

exceptions in the bills of lading but the appellant insisted that these did not protect the respondents, inasmuch as, at the time of the loss, the ship was not on the agreed voyage or on any permitted deviation therefrom.

This view was accepted by Rowlatt J. who tried the action, and he entered judgment for the appellant. He thought the case depended on the effect of the deviation clause and as to this he considered himself bound to follow a decision of Hill J. The respondents appealed, and the Court of Appeal, consisting of Scrutton, Greer and Sankey L.JJ., reversed the judgment of Rowlatt J. and entered judgment for the respondents, being of opinion that on the true construction of the bills of lading, in view of the surrounding circumstances, the ship was on the agreed voyage and therefore the question as to the effect of the deviation clause did not arise.

The respondents are the owners of a line of steamships (of which the *Cervantes* is one) engaged in carrying general cargoes between the ports of Spain and Portugal and the United Kingdom and North Germany. The business was established about a century ago. It has for many years been customary for the vessels of the line to make regular round voyages from the United Kingdom and back again calling at ports in Spain and Portugal to discharge or pick up cargo, as the case might require. At the time in question, April, 1927, the *Cervantes* in the ordinary course of her owners' trade was engaged in one of such round voyages and touched at Malaga outward bound. Having there shipped the appellant's goods she proceeded along the eastern coast of Spain, touching at various ports including Cartagena, and having reached Palamos retraced her steps touching at several ports and ultimately reached the United Kingdom. She did not touch at Malaga on the homeward voyage. The loss of the oil occurred as the consequence of heavy weather encountered between Malaga and Cartagena on the way out.

I now turn to the bills of lading. They are both in the same terms except that in the one case the destination is "to Liverpool" and in the other "to Bradford." They are in

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Spanish but we have been furnished with an agreed English translation. In the margin, together with other matter, are the words "MacAndrews Line" with a list of the ports at which the firm have offices including Malaga, Cartagena and other ports on the East Coast of Spain. The material passage is as follows: "Shipped by Leon Frenkel in the steamship *Cervantes* with destination to Liverpool with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation; to enter and leave ports without pilot; to assist and tow vessels in any circumstances; to discharge or load transhipment, send to destination by any means of transport, all responsibility of the ship ceasing on discharge from deck." There follows a specification of the goods and a number of provisions not material to the question. The exception clause is a wide one and includes perils and risks of the seas. The bill of lading purports to be signed at Malaga on April 11, 1927.

It is to be observed that the ship is not described as "now in the port of Malaga bound for Liverpool" the more usual way of describing the termini of a sea voyage, and in the case of the Bradford bill that town is obviously not such a terminus. The fact is I think that "destination" in both these documents means the ultimate destination of the goods which may or may not, according to circumstances be the termination of the voyage. The expression "send to destination by any means of transport" confirms this view.

The appellant insists that in both cases Liverpool is the proper port of discharge, and that on the construction of the contract the respondents were bound to carry the goods to Liverpool by one route and one only—namely, the direct route by which under ordinary circumstances a steamship at Malaga bound for Liverpool would travel, subject of course to permitted deviations, and they contend further that to proceed in a direction opposite to that of the home port cannot be treated as authorized by general words such as those in the clause now in question.

The appellant strongly relied on certain decisions of high authority—one in this House. I will examine these authorities

presently, but meanwhile I propose to consider the question of construction on principle.

In the first place I think the same principles of construction apply to bills of lading as to written contracts in general. It is well settled that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties. In the present case the question arises between the original parties to the contract, but this fact is in my opinion immaterial; so far as construction is concerned that must be the same whether the question arises as between the original parties or their respective assignees.

As to the material circumstances, in the present case there can I think, be no dispute. The ship was one of a line pursuing a regular course of trading in accordance with which her usual and customary routes with goods from Malaga destined for Liverpool would be determined by ascertaining whether she was at Malaga on the outward or the homeward section of her voyage; if the former her route from Malaga would be concisely described as "via Levante"—namely, "via the Eastern Coast of Spain," if the latter, as "directo." It thus appears that "route" is in this case an ambiguous word.

Parol evidence would then be admissible to prove in which of these two senses it was used by the parties to the contract.

The result of the evidence on this point is to my mind clear. The shipowners did all they could by advertisements in local papers, by personal communication with their regular shippers or their representatives at the port, and by the circulation of what are called shipping cards to intimate to those concerned whether a particular ship was sailing via Levante or directo. In the case of the *Cervantes*, she was advertised to sail via Levante.

The appellant himself was not at Malaga but his business there was conducted by responsible persons on his behalf. None of these persons was called. In my opinion the inference from the evidence is irresistible that the appellant through

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his agents at Malaga knew perfectly well that the voyage in contemplation was one via Levante and accepted that position.

The judges in the Court of Appeal were accordingly justified in coming to the conclusion that on the true construction of the contract the agreed voyage was that actually undertaken. In this view the question as to the meaning and effect of the deviation clause does not arise.

Are the authorities referred to by the appellant such as to preclude one from coming to the above conclusion? The only cases which it is really necessary to consider are those of *Leduc* v. *Ward* (1) and *Margetson* v. *Glynn.* (2)

In *Leduc* v. *Ward* (1) no question as to the construction of the contract in reference to surrounding circumstances arose. The voyage was by a ship stated to be lying at Fiume and bound for Dunkirk. There was no evidence establishing any latent ambiguity in these words, and the parol evidence by which it was sought to give a different meaning to what the Court held was the natural and commercial meaning of the words was rightly rejected. I think the judgment of Fry L.J. (3) makes it quite clear that the question what was the agreed voyage was one to be determined on ordinary principles of construction. In the view taken of the construction as to the voyage the effect of the deviation clause had to be determined and was determined against the shipowner, but that question, in the view I take, does not arise in the present case.

The same remarks apply to *Margetson* v. *Glynn.* (2) There again the voyage was described as on board a ship "lying at Malaga and bound for Liverpool," and the real question was as to the effect on such a case of a wide deviation clause. This was again decided on the principle that, the main object of the contract being ascertained, general words must be used so as not to be inconsistent with the performance of that object.

If an example of the application to the construction of a bill of lading of the general principles referred to above was

(1) 20 Q. B. D. 475. (2) [1892] 1 Q. B. 337; [1893] A. C. 351. (3) 20 Q. B. D. 483.

required, I think it is to be found in *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1) There the ship was said to be lying at Bari bound for Liverpool. The learned judge (Wills J.) held that "the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine and Black Sea ports," and so on. What is meant by "practicable" is clearly "practicable in a commercial sense," and the same might well be said of the course pursued by the *Cervantes* in the present case.

Arguments were addressed to your Lordships urging the extreme inconvenience to indorsees and others to whom bills of lading are submitted for financial purposes in the course of business, but if such contracts are—and by authority it is settled that they are—to be construed according to ordinary principles of law (see per Fry L.J., *Leduc* v. *Ward* (2)) then such an argument should be addressed to those who frame such documents, and not to the Court which has to interpret them. Under the Bills of Lading Act the effect of the indorsement is merely to transfer to the indorsee the rights and interests of the indorser; the contract must be interpreted without reference to such change of interest.

I agree that the appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 11, 1929.

Solicitors for the appellant: *Middleton, Lewis & Clarke.*
Solicitors for the respondents: *Richards, Butler & Co.*

(1) 18 Times L. R. 374. (2) 20 Q. B. D, 475, 483.

[HOUSE OF LORDS.]

H. L. (Sc.)* STEPHEN (Pauper) . . . . . Appellant;

1929

April 22. AND

COOPER . . . . . Respondent.

Workmen's Compensation—"Out of and in the course of the employment"—Added Peril—Driver of Reaping Machine attempting to adjust Harness without dismounting from Machine and without putting the cutting Blade out of Gear—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A farm servant was employed to drive a reaping machine drawn by two horses placed on either side of a centre pole and yoked to the machine by means of chains. While he was driving the machine one of the chains became detached from the backband of the near horse. The driver thereupon stopped the machine, but without putting the cutting blade out of gear, and attempted by walking along the pole between the horses to refix the chain. The pressure of his weight upon the pole made the horses start forward, and he fell from the pole on to the cutting blade and was seriously and permanently injured:—

Held, that there was evidence to support the finding of the arbitrator that the risk taken by the driver was not incidental to his employment, but was an added peril, due to his own voluntary conduct, and, accordingly, that the accident did not arise out of the employment.

Observations by Lord Shaw on the doctrine of "added peril."

Decision of the Second Division of the Court of Session in Scotland 1928 S. C. 337 affirmed.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland (1) upon a case stated by the Sheriff-Substitute of Aberdeen, Kincardine and Banff in an arbitration under the Workmen's Compensation Act, 1925.

The facts sufficiently appear from the opinion of the Lord Chancellor, and are summarized in the headnote.

The Case will be found fully set out in the report before the Second Division.

The first question of law submitted by the arbitrator for the opinion of the Court was whether there was evidence

**Present:* Lord Hailsham L.C., Lord Shaw of Dunfermline, Lord Buckmaster, and Lord Warrington of Clyffe.

(1) 1928 S. C. 337.

upon which it could be competently found that the injury which the appellant sustained was not due to an accident arising out of his employment with the respondent, within the meaning of s. 1 of the Workmen's Compensation Act, 1906.

A further question was submitted by the arbitrator, but this appeal is concerned with the first question only.

The Second Division (the Lord Justice Clerk, Lord Anderson and Lord Ormidale) answered the first question in the affirmative.

1929. March 4, 5. *Craigie Aitchison K.C.* (of the Scottish Bar) (with him *John Cameron* (of the Scottish Bar) and *James Craig* (of the English Bar)) for the appellant.

(1.) There was no evidence to support the finding of the arbitrator that the accident did not arise out of the employment.

(2.) The arbitrator has misdirected himself in three respects: (*a*) in treating gross negligence as something which would take the workman outwith the employment; (*b*) in confusing added peril, which is one thing, with aggravation of an existing peril, which is another; (*c*) in failing to recognize that serious and wilful misconduct where it results in serious and permanent disablement is not a disqualification under the statute. At the time of the accident the appellant was doing that which he was employed to do, but doing it in an improper manner. Added peril means something foreign to the employment. It is not enough to exclude the workman from compensation to show that what the man did was an imprudent act which exposed him to a risk which he would not have run in the ordinary course of his duty, but it must be shown that what he did was wholly unconnected with his employment—that a new kind of risk was introduced. Here the real risk that the workman ran was a risk from the cutting blades of the machine, which was a normal risk of his employment. Further, an added peril means a peril voluntarily superimposed on what arose out of the employment, but this was a peril inadvertently superimposed; the man forgot to put the cutting blades out of gear. [He referred to

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Barnes v. *Nunnery Colliery Co.* (1); *Plumb* v. *Cobden Flour Mills Co.* (2); *Lancashire and Yorkshire Ry. Co.* v. *Highley.* (3)] *Pepper* v. *Sayer* (4) is on all fours with the present case. This was not an added peril in the sense in which that phrase has been used; and it must be remembered that phrases which are useful as tests must not be allowed to dislodge the words of the statute: per Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (2) As to serious and wilful conduct, in the case of serious and permanent disablement, a workman may recover though the effect of his misconduct is to expose him to a risk which he would not be exposed to in the ordinary course of carrying out his duty: per Atkin L.J. in *Guest* v. *Gaston.* (5)

Duffes K.C., *L. H. Watson* (both of the Scottish Bar) and *James MacMillan* (of the English Bar) for the respondent were not called upon.

The House took time for consideration.

April 22. LORD HAILSHAM L.C. (read by LORD BUCKMASTER). My Lords, this is an appeal from an order of the Second Division of the Court of Session, made upon a case stated in an arbitration under the Workmen's Compensation Act, 1925. The facts are fully set out in the case stated by the learned Sheriff-Substitute.

It appears that in September, 1925, the appellant was working as a harvest hand in the employment of the respondent, who is a tenant farmer, and that on September 28, 1925, he was driving a two-horse mower. The horses were yoked to the mower by straps passing from the breast-pole through the collar, so that the weight of the pole rested on the horses' necks, and by chains extending from a hook fixed at the swingle-tree to a hook attached to each side of the back band of each horse, and thence to its collar, on to which it was fixed by means of a hook. If any of the chains became detached it was the duty of the driver to refix it.

(1) [1912] A. C. 44, 47.
(2) [1914] A. C. 62, 65, 68.
(3) [1917] A. C. 352, 361, 372.
(4) [1914] 3 K. B. 994, 998.
(5) [1927] 1 K. B. 1, 16.

The proper method of performance of this duty was to stop the machine, put the cutting blade out of action, twist the reins round the lever or hold them, so that the horses were kept in check, dismount from the mower, walk round to the horses' heads, and from that point refix the chain on the hook.

On the morning of September 28, 1925, while the appellant was driving the mower along the cornfield, the inside chain on the off-side of the near-side horse became detached. The appellant stopped the mower, but failed, or forgot, to put the cutting blade out of action; thereupon he left his seat and commenced to walk along the sloping pole between the two horses towards the horses' heads, balancing himself as he went. As a result of this action the horses were started forward, and the appellant lost his balance and fell on the cutting blade, sustaining serious injuries which resulted in his serious and permanent disablement. The learned arbitrator found that in walking along the pole the appellant was aware that he was adopting a course accompanied by very serious risk and danger, and that his action was not done for the purposes of and in connection with the respondents' business, but was a foolhardy act of bravado; and that the injury sustained by the appellant was due to an accident caused by an added peril due to his own conduct.

The learned arbitrator found in law on these facts that the injury sustained by the appellant was not due to an accident arising out of his employment, and stated for the opinion of the Court the question whether there was evidence upon which he could so find. Another point was also raised in the case, but was not opened or argued before your Lordships' House. The Second Division of the Court of Session answered the question in the affirmative.

In my opinion they were right in so doing. It was argued before your Lordships that the appellant's conduct was serious and wilful misconduct, and that since it resulted in his permanent disablement it did not disentitle him to compensation. But it is well established by a series of decisions in your Lordships' House that, apart altogether

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from the question of serious misconduct, if the accident arises from some peril to which the workman has exposed himself by his own conduct and which he was not obliged to encounter by any term of his contract of service, the accident cannot be said to arise out of his employment. Lord Dunedin states the principle in *Plumb* v. *Cobden Flour Mills Co.* (1) as follows: "A risk is not incidental to the employment . . . . when it is an added peril due to the conduct of the servant himself"; and Lord Haldane explains the expression "added peril" in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (2) as meaning a peril "voluntarily superinduced on what arose out of his employment, to which the workman was neither required nor had authority to expose himself." In my view these expressions exactly fit the risk which resulted in the injury in the present case, and I regard the case as indistinguishable in principle from the decision in *Lancashire and Yorkshire Ry. Co.* v. *Highley.* (2) In that case a workman in the employment of a railway company crossed the railway lines in order to reach a messroom at which he could get hot water for his breakfast, and crept between the trucks of a stationary goods train in the mistaken belief that there was no engine attached; while he was doing this the train moved and he was killed. It was held in your Lordships' House that the workman was entitled to go to the messroom and entitled to cross the lines to get there, but that in passing between the trucks "he clearly added a peril to his employment to which the employer had given no sanction, with the result that the ensuing accident was not an accident arising out of his employment": per Lord Dunedin. I agree with the learned judges of the Court of Session in holding that there was ample evidence to justify the arbitrator in finding that the principle of "added peril" applies to the present case, and that consequently there was evidence on which he could properly find that the injury was not due to an accident arising out of the employment of the appellant, and that he was not entitled to compensation under the terms of the Workmen's Compensation Acts.

(1) [1914] A. C. 62, 68. (2) [1917] A. C. 352, 361, 365.

It follows that this appeal should be dismissed, and I move your Lordships accordingly.

LORD SHAW OF DUNFERMLINE (read by VISCOUNT DUNEDIN). My Lords, I confess to having very great difficulty in this case.

It is a satisfaction to have the facts stated with such clearness and fullness in the findings of the learned arbitrator, Sheriff Laing, and it is clear from the note appended to his findings that he had given much consideration to the numerous authorities bearing upon the points for decision.

From the findings it appears that the appellant was engaged as a harvest hand by his employer, and was driving a two-horse "Woods" mower, furnished with the usual central pole, and drawn by a pair of horses. While driving the team a chain hooked in the ordinary way to the back band of one of the horses became unhooked and had to be rehooked. The appellant thereupon pulled up, stepped forward on the pole, and leaned down to refix the gear. In doing so the horses became restive and started, and in starting drew forward the mower, the cutting blade of which the appellant had, through inadvertence, not put out of action, and his left hand was severed at the wrist and his right arm lacerated, and he is permanently disabled. I agree with the learned judges of the Second Division and with all your Lordships that the accident arose in the course of the unfortunate man's employment.

I confess that if the arbitrator had found that it arose out of his employment I should also have agreed with that, or at least have found no sufficient ground to disturb such a finding. He has, however, found to an opposite effect—the accident did not arise, according to his finding, out of the employment. The Second Division agrees with that, and the point is, in my opinion, very fine and very difficult. In considering the effect of the act one cannot forget that, since the injury is permanent, the statute would have afforded a remedy to the appellant notwithstanding that his conduct had even been construed as serious and wilful misconduct. If, however, the accident did not arise out of his employment

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as well as in the course of it, this proviso flies off, and no statutory remedy is provided.

It must be remembered that, as I view the facts, this case is not governed by those in which there was a breach or defiance of either a statutory or an express prohibition. The citation of *Barnes* v. *Nunnery Colliery Co.* (1) is an illustration of what is meant. A boy employed at a colliery, in proceeding to the level where his work was, jumped into an empty tub drawn by a rope instead of walking. His head came in contact with the roof of the mine, and he was killed. The report states that " the evidence showed that it was quite a common practice for boys to ride in the tubs in order to get to their work. But it also appeared that the use of the tubs for this purpose was forbidden, and that notices to this effect were placed at the pit bottom and in the lamp room." As Lord Mersey said : " The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition."

And I should respectfully entirely adopt Lord Loreburn's language when he said : " If the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." I further think it a sound proposition and a good guide to arbitrators to remember the rule stated by Lord Loreburn in these words : " An arbitrator has to ask himself, was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman, liable like other men to be careless and take short cuts, might be exposed in doing what he had to do ? " These sentences, in my view, still remain of the very highest authority, and I remain in some doubt whether the learned arbitrator fully realized the great cogency and force of the injunction which they contain. It may be that, with a fuller sense of that, the Sheriff would not have reached the conclusion that he did reach, that the act of the injured man did not arise out of the

(1) [1912] A. C. 44, 47, 51.

employment. It will be seen amid variety in facts how fine the distinctions among them are which an arbitrator has to deal with in settling the question of what is or is not reasonably incidental to the employment.

A similar case in principle was that of *Herbert* v. *Samuel Fox & Co.* (1), when the House of Lords decided that the accident was occasioned by the workman falling from the buffer of a wagon on which he was improperly riding, and that it therefore arose, not out of the employment, but through the doing of an act which was expressly put outside the sphere of that employment.

To start with, however, this was not a case of express prohibition.

Then come the range of cases such as *Plumb* v. *Cobden Flour Mills Co.* (2), in which the act done—the substitution of mechanical for manual labour—was not expressly forbidden, but was, by its nature and kind, reckoned to be out of the range of employment. This occurred in *Plumb's* case by reason of a new method accompanied with great danger having been adopted to perform by machinery the lifting of sacks instead of the piling of them by hand. From *Barnes* (3) and *Plumb* (2) naturally were taken the words "added peril," which have figured so much in subsequent cases and in which undoubtedly the doctrine those words are supposed to cover has been carried very far. In *Lancashire and Yorkshire Ry. Co.* v. *Highley* (4) a workman at a station on his way to the messroom attempted to pass under the trucks of a standing goods train. The train moved, and he was killed. There was a longer way round to the messroom, but the men, for their own convenience, habitually used a short cut. It is noticeable that the county court judge found that the accident did not arise out of the employment. The Court of Appeal reversed the result found by the arbitrator, and the action of this House, in reversing the Court of Appeal, appears to me to have been in substance due to the deference paid to the finding on a narrow point

(1) [1916] 1 A. C. 405.
(2) [1914] A. C. 62.
(3) [1912] A. C. 44.
(4) [1917] A. C. 352, 359.

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of fact by the arbitrator himself. Lord Finlay expressed himself thus: "No doubt the distinction between acts done in the course of the employment but in an improper way, and acts done outside the course of the employment altogether may be a fine one. This is illustrated by the difference of opinion in this House in the case of *Herbert* v. *Samuel Fox & Co.* (1) In the present case the facts seem to me to put it under the second of these two categories, and I am certainly not prepared to reverse the finding of the county court judge, which is, as I read it, to the effect that it was outside the course of employment. It has been often pointed out that it is highly undesirable that findings of fact by the county court judge in workmen's compensation cases should be overruled in Courts of appeal. I would refer especially to what was said on this subject in the case of *Baker* v. *The Earl of Bradford* (2) in your Lordships' House." To this Lord Haldane added: "Although I think that the county court judge might have given more precise reasons for his findings, I am of opinion that there was evidence to warrant it and that it discloses on its face no error in law."

Lord Dunedin took, on his own account, a stronger view of the evidence, stating that in his judgment the workman "clearly added a peril to his employment to which the employer had given no sanction." It is to this phrase that I particularly alluded when I said that that case had carried the doctrine of added peril very far; but it is proper to observe that in the course of *Highley's* case Lord Dunedin, referring to *Plumb*, made this observation: "It is with insistence laid down in that judgment that the question is always whether the case falls within the words of the Act, and that 'added peril' is a test only, though a very convenient test in certain circumstances." I entirely agree with that observation.

Of added peril and the cluster of cases around that phrase I would beg to be allowed to say that there are no inconsiderable dangers of an erroneous development of the law by making added peril a sole test and therefrom a settled and conclusive

(1) [1916] 1 A. C. 405. (2) (1916) 9 B. W. C. C. 436.

category of cases which are excluded from the "remedial" operation of the Workmen's Compensation Act.

Granted an extra hazard, it is not enough to dub it an added peril and to follow the cases; the true inquiry may be only beginning. On the one hand a fundamental question is, was the course taken by the workman prompted by his own indolence or purely for his own convenience and not in the interests of the work, say, by effectiveness or dispatch? If so, then the extra hazard is not only an added peril but a needless peril, and an arbitrator is free to find that the accident did not arise out of the employment.

On the other hand, the conditions, not merely of skilled labour, but of much simpler and more ordinary labour, over and over again present emergencies and unexpected difficulties, great and small, and Courts and arbitrators should be slow to reckon out of the employment unusual acts done or simple devices adopted to get the work forward and to meet emergent difficulties. The merit of a good workman is to show a dexterity both of hand and mind to overcome these, and he may under-estimate the hazard of his efforts in the attempt to be both a time saver and a labour saver. But in my opinion the statute does not on a sound interpretation mean that an accident occurring in the course of such acts and with the hazard referred to did not arise out of the employment. The range of routine is not necessarily the measure of employment. The statute so construed would be a clog upon initiative. The words "added peril" do not end the matter. If they did, an inversion of a remedial statute would be accomplished and meritorious labour would be penalized. In the case figured the only proper finding of the arbitrator is that the accident did arise out of the employment.

In the present case there was no express rule or prohibition, and the only implication of a prohibition is derived from a custom that a driver should stop the machine and go round and hook the chain while he is between the horses' heads instead of leaning forward between their flanks. I may have my own opinion on the subject of such an implication; but the arbitrator is charged with finding on the facts, and having

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had all the evidence before him he has found that the accident did not arise out of the employment. I cannot usurp his functions, nor can I be sure that he did misdirect himself.

I therefore reluctantly and with doubt agree.

LORD BUCKMASTER. My Lords, I agree with the motion proposed from the Woolsack, and I merely desire to say that I think the case is completely covered by the case of *Lancashire and Yorkshire Ry. Co.* v. *Highley.* (1)

LORD WARRINGTON OF CLYFFE. My Lords, this appeal raises the not uncommon but sometimes difficult question under the Workmen's Compensation Act, 1906, whether an injury by accident arises out of the workman's employment.

The appellant is a farm servant, and during the harvest season of 1925 was in the employment of the respondent as a harvest hand. On September 28, 1925, he was engaged in driving a two-horse mower for cutting corn. It was part of his duty to replace one of the draught chains hooked to the back band of a horse in case it should become detached. On the morning in question the chain on the off-side of the near horse became detached, and the appellant endeavoured to replace it by walking along the pole of the machine. While doing so the horses started, he lost his balance and fell, was caught by the cutting knives, which he had not put out of gear, and was seriously and permanently injured.

He claimed compensation under the Act, and his claim was heard by the Sheriff-Substitute as arbitrator, who rejected the claim on the ground that the injury by accident did not arise out of the employment, but by reason of an added peril voluntarily incurred by the appellant. He stated a case for the opinion of the Court of Session, and the learned judges of that Court unanimously answered in the affirmative the question put to them—whether there was evidence on which it could be competently found that the injury which the appellant sustained was not due to an accident arising out of his employment.

(1) [1917] A. C. 352.

In the Case the facts held to be admitted or proved are stated by the arbitrator in great detail and with much precision. After a minute description of the construction of the machine and the mode in which the horses are harnessed thereto, which need not be repeated except to mention that the weight of the pole rests on the horses' necks, and that they are yoked to the machine by chains extending from hooks fixed on to the swingle-tree to hooks attached to each side of the back band and thence to hooks on the collar, he states (15) that it is the duty of the driver of the mower to replace any one of the chains on its hook on the back band of either horse in the event of such a chain coming off. He then in (16) describes the "customary and proper" method of replacing a chain, which, stated shortly, is to stop the machine, put the cutting blades out of action, and then, holding the reins so as to check the horses in case of necessity, to walk to their heads and refix the chain from there.

Finding No. 17 is as follows: "That for a driver to attempt to replace the inside chains on their respective hooks on the back bands by rising from his seat, stepping over the tool box and oil can, walking along the pole and bending down to lift the chain, would be an act fraught with grave danger, particularly if the cutting blades had not been put out of action, the reason being that when the horses are yoked the pole inclines at an angle, and anyone attempting to walk on it has not only a balancing feat of some difficulty to perform on a sloping pole, but has to reckon with the probability that he may lose his balance owing to the horses starting forward on account of the sudden strain placed on their necks by his weight and the consequent swaying of the pole."

The arbitrator then describes the happening of the accident, stating, amongst other things, that instead of proceeding in the manner described in finding 16 he did exactly what is in finding 17 stated to be fraught with grave danger, and that what happened was that which in the same finding is said to be likely to happen. He then finds (25): "That

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in balancing himself on and walking along the pole in the manner above described, the appellant was aware that he was adopting a course accompanied by a very serious risk of danger," and (28) "that the injury sustained by the appellant was due to an accident caused by an added peril due to his own conduct." On these facts he found in law that the injury which the appellant sustained was not due to an accident arising out of his employment.

A further point was raised on behalf of the appellant both before the arbitrator and in the Court of Session under s. 7 of the Workmen's Compensation Act, 1923, but this point has now been given up, and I need say nothing about it.

The main argument addressed to this House was that the evidence disclosed no more than serious and wilful misconduct within the employment, in which case he would, as the injury was serious and permanent, be protected by proviso (*c*) to sub-s. 2 of s. 1 of the Act of 1906. I cannot agree with this contention. In my opinion it was quite open to the arbitrator on the evidence to find that what the appellant did was not merely an improper way of doing what he was employed to do—namely, replacing the chain—but was the doing of a thing—namely, the walking along the pole—which, whatever the object with which it was done, was a thing he was not employed to do and was not in the contemplation of either party to the contract.

Authorities in such cases are not of much use except so far as they supply a test which may be of general application. In *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1), however, there is a case which in substance is singularly like the present, and contains a statement by Lord Sumner of a test which may well be applied to this case. It was within a man's employment that he should visit a messroom for purposes connected with his meals. To get there he had to cross some running lines of rails. He had occasion to visit the room for one of the purposes mentioned above. Direct access was barred by some trucks standing on one of the running lines. Instead of passing round the trucks he crept under them, and

(1) [1917] A. C. 352, 372.

while he was doing so they moved, and he was killed. The arbitrator had found that the accident did not arise out of his employment; the Court of Appeal, however, thought that the facts only established an improper way of doing what was within the employment. This House restored the finding of the arbitrator. Lord Sumner, in expressing his opinion, said: "There is . . . . one test which is always at any rate applicable, because it arises upon the very words of the statute and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

Applying that test, it seems to me it was open to the arbitrator to find that it was not within this man's employment to hazard the grave danger he incurred here or to do the foolish and risky thing he did, and, that being so, it is not open to this House to disturb his finding, and this appeal must be dismissed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed.

Lords' Journals, April 22, 1929.

Agents for the appellant: *E. Smith & Co., for James A. Hadden, Advocate, Aberdeen, and Hume McGregor & Co., S.S.C., Edinburgh.*

Agents for the respondent: *Smith, Rundell, Dods, & Bockett, for G. Gordon Masson, Peterhead, and Menzies, Bruce-Low & Thomson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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CHAPMAN OR OLIVER AND ANOTHER . APPELLANTS;

AND

SADDLER AND COMPANY AND OTHERS RESPONDENTS.

Negligence—Defective Plant—Liability of Party permitting Use of Plant to Servant of Party using it—Stevedore—Slings owned by Stevedore—Use of Sling by Porterage Company with Acquiescence of Stevedore—Injury to Servant of Porterage Company through Defect in Sling.

A firm of stevedores employed by a shipowner and a porterage company employed by the consignee of the ship's cargo were engaged in unloading a ship. The cargo consisted of bags of maize, which were made up into loads by the stevedores and held together by rope slings provided by the stevedores, and the bags were then raised by the stevedores from the hold to a steelyard on the deck. The stevedores' duty ended with the deposit of the bags on the steelyard, from which they were transported to the dock by the porterage company by means of a dock crane. The stevedores gratuitously permitted the porterage company to use their slings, which were already round the bags, for the transport of the bags to the dock, and it was a matter of mutual convenience that the same slings should be used throughout. The stevedores employed a servant specially charged with the duty of inspecting the slings and, as the stevedores knew, the porters relied on the care of the stevedores for the safety of the slings. A sling broke while the bags were being transported from the steelyard to the dock, and the bags fell and killed a servant of the porterage company.

In an action of damages brought by his dependants against the stevedores:—

Held, that in the special circumstances of the case the firm of stevedores owed a duty to the porters to see that the sling was in a fit condition to take the weight of the load entrusted to it, and, on the facts, that the finding of the Lord Ordinary that they had failed to discharge that duty ought not to be disturbed.

Caledonian Ry. Co. v. *Warwick* (1) [1898] A. C. 216 distinguished.

Decision of the First Division of the Court of Session in Scotland (1928 S. C. 608) reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary.

* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD ATKIN.

(1) *Mulholland* [the party's maiden name] *or Warwick* in the full title of the case, according to Scottish practice.

The action was brought by the appellants, the widow and children of John Oliver, a dock labourer in the employment of the California Company of Porters, Leith, against the respondents, a firm of stevedores in the Port of Leith, for damages in respect of his death, which occurred as the result of an accident on December 10, 1925.

The Lord Ordinary (Lord Morison) awarded damages to the appellants, but the First Division (the Lord President, Lord Sands and Lord Blackburn) held that in the circumstances of the case the respondents owed no duty of care towards the deceased and assoilzied them from the conclusions of the summons.

The facts are stated in the judgments of Lord Buckmaster and Lord Atkin and are summarized in the headnote.

1929. March 7, 11. *Craigie Aitchison K.C.* (of the Scottish Bar) (with him *James A. R. MacKinnon* (of the Scottish Bar) and *W. S. Morrison* (of the English Bar)) for the appellants. The action was laid on negligence. The negligence complained of was the failure of the respondents to see that slings furnished by them were fit for use in the discharge of the steamship *Platon*. The appellants maintain that the respondents failed in a duty of reasonable inspection. The question in issue was whether there was a duty of inspection in a question with the deceased John Oliver. Oliver was not an employee of the respondents, but he was one of the squad of porters who handled the cargo being discharged from the deck to the quay. In the submission of the appellants the relationship between the porters and stevedores was such as to impose upon the latter in the matter of the supply of slings, and also in the matter of their inspection, a duty of ordinary care. The circumstances giving rise to the duty were these: 1. The slings were provided by the stevedores in accordance with the custom of the Port of Leith for purposes of use by the porters in the work of discharge. It was not merely use, but provision of slings for a specific purpose. 2. The stevedores had a practical interest in the porters' use of the slings. It was for mutual convenience, expedition,

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and quicker discharge. 3. Effective control remained with the stevedores throughout. 4. The use made by the porters of the slings was in substance a taking delivery of the cargo. 5. The slings were supplied by the stevedores in the knowledge that the porters relied on the stevedores' inspection of them. The aspect of control is important. The question is where was the control in the vital matter of the inspection of the slings? In the appellants' submission it lay with the stevedores for these reasons: (1.) The particular sling to be used was selected by the stevedores; (2.) it was returned to the hands of the stevedores every minute; (3.) the porters had no right to retain it; (4.) the stevedores had a right to remove it at any stage of the operations; (5.) it could be replaced by the stevedores alone; (6.) the hatchman and the rigger, who are servants of the stevedores, in practice inspected it; and (7.) no opportunity was afforded to the porters to make an inspection of it prior to use. *Caledonian Ry. Co.* v. *Warwick* (1) and *Kemp & Dougall* v. *Darngavil Coal Co.* (2), founded on in the judgment of the First Division, are clearly distinguishable. There is an obvious difference between the provision of a wagon which could and would be inspected by the user as a normal incident of the day's working, and the provision of a sling for immediate use which could not, from the exigencies of the work, be inspected until after use had been made of it. The present case falls more properly within the dictum of Lord Kinnear in *D. Traill & Sons* v. *Actieselskabat Dalbeattie* (3), where a distinction is drawn between the provision of a rope sling for a special purpose, on the one hand, and a mere borrowing on some casual necessity of apparatus which happened to be available, on the other hand. It is not necessary for the appellants to found upon Lord Esher's dictum in *Heaven* v. *Pender* (4), which has been questioned as being too wide. The appellants, however, were within the dictum of Cotton and Bowen L.JJ. to the effect that there is liability even where control does not remain with the owners of the chattel

(1) [1898] A. C. 216.
(2) 1909 S. C. 1314.
(3) (1904) 6 F. 798, 808.
(4) (1883) 11 Q. B. D. 503, 510, 515.

if the thing is handed over for immediate use. See also *Elliott* v. *Hall.* (1)

Normand K.C. (of the Scottish Bar) (with him *J. R. Wardlaw Burnet* (of the Scottish Bar) and *H. L. Holman* (of the English Bar)) for the respondents. The duty of the respondents came to an end when the bags were placed on the steelyard. From that moment the discharge was taken over by the porters and the stevedores did not handle the bags in any way. The two operations were distinct. There was no contractual obligation on the stevedores to supply slings to enable the bags to be put on shore, and they permitted the porters to make use of the slings for their, the porters', own convenience. It is common ground that the use of the respondents' slings by the porters was gratuitous and such use can impose no higher obligation than that of a lender under a contract of gratuitous hire—namely, to communicate defects of which he is aware. The accident happened in the course of the execution of an independent operation with which the respondents had no concern and which involved risks which were not incidental to their own contract. This case is indistinguishable from *Caledonian Ry. Co.* v. *Warwick* (2) and *Kemp & Dougall* v. *Darngavil Coal Co.* (3): see also *R. T. Wood & Co.* v. *A. & A. Y. Mackay* (4); *Robertson* v. *Fleming* (5); *Earl* v. *Lubbock.* (6) Assuming that the respondents owed a duty to the deceased to see that the rope was fit for the purpose for which it was being used, upon the facts the breaking of the rope was due to a latent defect, for which they were not to blame.

Craigie Aitchison K.C. replied.

The House took time for consideration.

April 29. LORD BUCKMASTER. My Lords, the real appellants in this case are the widow and five children of a dock porter named John Oliver, who died on December 21, 1925, owing to injuries he received on December 10, 1925, while unloading grain from the steamship *Platon* at the Port of Leith.

(1) (1885) 15 Q. B. D. 315.
(2) [1898] A. C. 216.
(3) 1909 S. C. 1314.
(4) (1906) 8 F. 625, 632.
(5) (1861) 4 Macq. 167.
(6) [1905] 1 K. B. 253, 257.

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The respondents are a firm of stevedores who were separately employed in an independent operation connected with the discharging of the cargo on the day in question.

The injury of John Oliver was caused by the breaking of a defective rope, the property of the respondents, which formed the sling holding six bags of grain. The rope broke as the grain was being swung from the deck of the vessel to the quay, with the result that the bags fell on the deceased.

These facts are not in dispute. What is disputed is the allegation that the respondents owed any duty to the deceased to see that the rope was sound, and, alternatively, if such duty existed, the respondents say it was discharged.

These issues were found against the respondents by the Lord Ordinary who tried the case, and in their favour by the First Division of the Court of Session.

The first of the issues involves a question of law upon which I have found little help in considering the statement of general propositions such as those contained in the judgment of Lord Esher in the case of *Heaven* v. *Pender*. (1) The duty alleged to have been owed by the respondents to the deceased is said to arise out of a combination of special circumstances that have nowhere been the subject of decision, and these circumstances require close examination.

The method of unloading a ship at the Port of Leith involves the employment of two distinct groups of men, who are severally employed by the owners of the ship and the receivers of the cargo. The former are the stevedores and the latter the porters.

In the case of a grain cargo the shipowners give delivery on to steelyards on the vessel's deck, where the bags are placed by the stevedores, who lift them from the hold ; from the deck the porters take control and discharge the cargo on to the quay. The method adopted for this latter operation is at the discretion of the porters and depends in part on the tide and the height at which the vessel is riding. If the deck is above the quay it is obvious that the simplest method is to slide the bags down a gangway, but under different

(1) 11 Q. B. D. 503, 507.

conditions, such as those existing in the present case, the bags are slung from the deck to the quay by cranes belonging to the Leith Dock Commissioners. Although the operations of bringing the bags on to the deck and transferring them to the quay are distinct, there is one feature that remains throughout, and that is the grouping of the bags in sets. This is effected by the stevedores in the hold of the vessel, who provide the ropes necessary for the slings in which the sets are placed. These slings are never undone throughout the combined operations. The bags are hauled up by the stevedores and placed on the steelyards; the slings are then detached from the derrick and hooked to the crane tackle and immediately slung ashore. It is in the interests of every one concerned in the expeditious discharge of the cargo that these operations should be continuous. The ropes, which are provided by the stevedores, are thus used throughout, and this is the common and accepted practice. The danger due to imperfection in the ropes is well known, and the stevedores have a man whose business it is to make the slings and to examine these ropes before use—both those that are new and those that have been used. With him also lies the custody of the ropes; and so important is this constant supervision that the ropes are kept separate, the new ones being separated from those once used. It is in fact essential for the safety of all concerned that the ropes should be kept under constant examination to detect any weakness that might from time to time arise. The nature of the operation itself is such that effective examination by the porters is almost impossible. To examine the rope when the goods are taken off the steelyard would involve complete unloading of the set, and when the bags are released the rope is, in the ordinary course, withdrawn for the next consignment.

It is stated in the evidence that in these circumstances the porters relied on the stevedores to examine the ropes, that the stevedores knew that such reliance was placed on them, knew the danger, knew that in the accepted course of unloading the porters could not properly make the examination themselves, and did not make it, and that

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consequently they owed a duty to see that such examination was made with due care and skill. This evidence is in part contested by the respondents, but in substance I think it must be accepted. The defenders' witness, David Moffat, says that his men—that is the stevedores—are "deeply interested" in the slings, especially when working underneath them; and, again, he says he relies on "the rigger"—that is the rope inspector—seeing that the rope is good, and that "all the men who work with the cargo rely on the rigger seeing that all the ropes are good."

There is other evidence to the same effect and also evidence explaining and attempting to modify these statements, but the character of the operation, itself well known and established for some years, seems to me to lead irresistibly to the conclusion that the evidence I have quoted fairly states the true position, and I agree in the conclusion of Lord Morison that these circumstances did disclose a duty cast on the respondents to take proper steps to see that the ropes were safe. That inspection was essential is common ground; that the opportunities for such inspection by the porters was extremely limited and, without interruption of the operation, could not be properly carried out seems to me plain; and that in these circumstances the respondents, who knew that their inspection was relied on by the porters for their safety, discharged the duty of inspection on behalf of all parties is, in my opinion, the only reasonable inference. It does not therefore seem to me that the Lord President accurately stated the position when he said the question remained to be answered whether the rope was being used on the stevedore's business, and that he considered the case concluded by *Caledonian Ry. Co.* v. *Warwick* (1), a case which influenced the judgment of the other learned judges, and, if it is relevant to the case, binds this House as well. In my opinion, however, the critical features of this case are lacking in that authority.

In that case coal was put into the trucks of the Caledonian Railway Company for delivery to certain gasworks at Glasgow;

(1) [1898] A. C. 216; 25 R. (H. L.) 1.

at Dumfries the railway system of the Caledonian Railway Company ended, but the Glasgow and South-Western Railway Company, who had undertaken to carry the coal for the consignees, then took charge of the wagons and proceeded to haul them over a private line. In the course of this latter operation, owing to a defect in the brakes of one of the wagons, an employee of the Glasgow and South-Western Railway was killed. The suit of his representatives to recover damages for his death versus the Caledonian Railway failed, upon the ground that they had nothing whatever to do with the operation in which the accident occurred. At first sight it certainly appears that the cases are allied. In each there was one complete operation carried out by two different agencies and a defective instrument owned by the one party and provided for the use of the other gave rise to the accident, but closer examination has satisfied me that the determining factors which exist here were absent there. In that case examination of the wagons was equally open to both persons by whom they were used. It was not known by the Glasgow and South-Western Railway Company whether the Caledonian Railway had examined them or not, and even if they had, it was perfectly clear that neither the Caledonian Railway nor the Glasgow and South-Western Railway Company ever for a moment thought that examination by the former was to be relied on by all the persons who at different stages made use of their stock. It is not the fact of one operation effected in two stages by two persons with the common use of the property of one of them that creates liability, it is the fact that for the safe conduct of that operation something must be done, and that in the circumstances of this case the performance of that act could only be reasonably carried out by one party to the work. Finally, I am satisfied from the evidence that this position was known to the defenders, and, never having been repudiated, must be regarded as having been accepted by them. There remains the question as to whether the duty was discharged, and upon that question, from the shorthand notes of the evidence, it is clear that different opinions might well be formed; but

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in all such questions I attach great importance to the finding of the learned Lord Ordinary, who saw the witnesses and before whom the evidence was given, associated with all the incidents due to inflection of voice, appearance, and manner of the witnesses, and the circumstances that make a living scene of that which on appeal is reduced to the flat monotony of print. No question is raised here as to the effect of documents on verbal testimony nor any of the matters upon which it might have been possible to hold that important elements in the evidence had been overlooked or overstressed. For these reasons I accept the conclusion of fact reached by the Lord Ordinary at the trial, and it follows that in my opinion the interlocutor pronounced by him should be restored.

LORD ATKIN. My Lords, at the request of my noble friend Lord Dunedin I proceed to deliver my own judgment next. This was an action brought by the widow of a dock labourer, John Oliver, to recover damages for herself and her children for the death of her husband, due to the alleged negligence of the defenders. The defenders deny that they owed any duty of care towards the deceased, and that, if any duty of care existed, they were guilty of any breach. Both issues were decided against them by the Lord Ordinary, but on appeal the learned judges of the First Division reversed the decision on the issue of duty, refraining from expressing any final opinion on the issue of breach.

In order to determine the questions in dispute it is necessary to examine the facts with some care. John Oliver, the deceased, was a dock labourer, who was employed on December 10 in discharging the cargo of the steamship *Platon* at the Port of Leith. The discharge had been continuing for four or five days, and on this day Oliver was taking part in discharging the cargo of No. 5 hold, which consisted of maize meal in bags. Oliver was engaged in receiving the bags on a staging on the quayside. As a load of six bags was being swung by the shore crane over the staging the rope sling that held the load gave way

and the bags fell on Oliver, inflicting injuries from which in a few days he died. The particular question is whether the defenders owed a duty to Oliver to take reasonable care that the sling should be fit to carry the load; and, if so, whether they omitted to take such care, whereby the sling broke. The *Platon* was being discharged in accordance with the custom of the Port of Leith, which for grain cargoes appears to be as follows. The ship's part in the discharge is performed by stevedores on behalf of the shipowners; the defenders are the firm of stevedores who acted for the *Platon*. When discharge is made of cargo in bags the stevedores' men in the hold make up loads of five or six bags, which are held together by a rope sling. The sling consists of a length of three-inch rope six fathoms long, the ends of which are spliced together so as to form one continuous whole. When the sling is used it is laid down doubled so that two lines of rope are adjacent. The bags are then laid crossways over the sling, the ends of which are then drawn over the middle of the bags, the loop at one end is drawn under the loop at the other end, and is attached to the hook of the ship's derrick. The load is then drawn up by the ship's derrick and lowered on to a steelyard on the deck. At that stage the operation is continued by the agents of the receivers of the cargo. At Leith the merchant's part in discharge is undertaken by companies of porters — unincorporated associations of men of various numbers and with distinctive titles. In this case the discharge was in the hands of the California Company of Porters, consisting of eight men, by whom Oliver was employed. Two of the porters' men on deck detach the derrick hook from the load, and after the weight has been recorded by official weighmen the porters take delivery on behalf of the receiver. Several methods are open to the porters. They may handle the bags by hand labour and carry them or truck them by gangways to the quay. If the elevation of the ship in relation to the quayside permits, they may discharge the bags by chutes to the quay. But the more usual method, convenient to all parties, because it is quicker, is to transfer the load by crane to the quay. This was the

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method employed in discharging the *Platon's* cargo in bags. The porters obtain the use of the shore crane belonging to the Leith Dock Commissioners. After weighing the load men on deck attach the hook of the shore crane to the sling, and the load is swung on to the desired position on the quay, quay space, railway truck, or, as here, staging. The porters' men on the quay receive the load, release the sling from the crane hook to release the bags, and then attach the now empty sling to the crane hook for the purpose of being swung back in return to the ship. The sling, when the crane returns, is detached by the porters and handed to the stevedores' hatchway man, who returns it down the hold for its next journey.

1. It will thus be seen that the same sling is attached to the load for the whole journey from hold to quay. This seems to me to be an obvious business necessity. The ship's part of the discharge would obviously be hopelessly obstructed if the shore crane had to wait while the six bags were handled afresh from the steelyard and laid upon another sling, while the ship's derrick had already swung back to the hold and was picking up a fresh load.

2. The next important fact is that the slings for the operation are provided by the stevedore. This is the invariable practice, and it seems to me at least possible that it has become part of the custom of the port, so as to form an incident in the contract between shipowner and bill of lading holder, between shipowner and stevedore, and possibly a term of implied contract between stevedore and porters. But this contention was not put forward and therefore not investigated at the trial, and cannot be taken into account in this case in this House ; and I refrain from expressing any final opinion about it.

3. It is apparent that the safety of every one concerned in the discharge depends upon the strength of the sling. The total weight of the load of six bags is slightly over 10 cwt., and the life of any one who comes under the load, whether in the hold, on deck, or on the quay, is imperilled by a defective sling.

4. The stevedores recognize that it is their duty to take care that the sling is fit to carry the load. They have a servant, the rigger, specially charged with the duty of preparing slings and inspecting them when made and when in use. His duty is to prepare them from new and satisfactory rope, to see that they are not used to excess, and to visit the ship once or twice a day to examine the slings in use and reject those that he thinks defective. In addition to this it is the duty of the hatchway man, through whose hands the sling passes on its return journey, to examine and reject a defective sling; and a similar duty is cast upon the men in the hold. As the safety of the latter depends upon the efficiency of the sling it is obviously their interest as well as their duty to their employer to take this care.

5. The porters themselves have no real opportunity of examining the slings. On the steelyard it still encircles the bags, and no examination of any value is even possible. It is not until it has completed its loaded journey that it is detached and in the porters' hands at all, and then only in the hands of men whose duty it is at once to handle six bags, and whose whole duty in relation to the sling is to attach it to the shore crane for speedy return to the ship. It follows that in practice, as was clearly established in evidence by the evidence of porters and of stevedores, the porters rely for the safety of the sling on the care of the stevedores, and the stevedores know that the porters so rely.

The only addition that it seems necessary to make to the general statement of facts is that, in this particular discharge of No. 5 hold, double loads were being handled by the derrick and the crane. Six bags were held by each sling, but two loads were attached by a saddle to the hook and were so conveyed by the crane to the shore. It was one of such loads that fell upon the deceased, the other being left suspended. Fourteen slings were in use in the hold: two would be on the loads being discharged, two would be in course of return, and ten would be in the hold having loads made up on them.

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In the circumstances detailed above I am of opinion that the stevedore firm owed a duty to the porters to take reasonable care to see that the sling was in a fit condition to take the weight of the load. They provided a sling to be used in conditions of danger by their own men, and to be used in similar conditions by the porters, knowing that the latter would have no reasonable opportunity of examining the sling, and intending that they should rely on the examination by themselves—the stevedores. They clearly owed a duty to their own men as to every one on deck while the load was being swung by the ship's derrick ; and it appears to me that in this case the duty continued towards the men who were concerned in the second part of the operation. They intended, for their own business convenience, that the one sling should complete the cycle ; and in my opinion intended that the safety of the sling should, throughout the cycle, depend upon their own vigilance, and upon that of no one else. They appear to me to be responsible if through lack of vigilance personal injury is suffered by one who was entitled to trust to them.

I cannot agree with the opinion expressed below that the stevedores in these circumstances were in the same legal position as though they were gratuitous bailors. If such had been the relation simpliciter, I agree that the bailor would only have been liable for a defect actually known to him. In the present case the porters were possibly entrusted with the sling, but merely to be used in a particular way, to be returned forthwith to the bailors in an operation, the speedy completion of which was of vital importance to the bailors' business, where bailor and bailee, to the knowledge of both, relied for their safety on the care of the bailor. In these conditions the rule as to gratuitous bailors appears to me to have no application.

Similarly the facts appear to distinguish this case from the *Caledonian Ry. Co.* v. *Warwick.* (1) In that case, which turned on the question whether the pleadings disclosed a relevant case against the Caledonian Railway Company,

(1) [1898] A. C. 216.

it appeared that the company had conveyed coals from a colliery consigned to the Dumfries Gas Commissioners. The haulage by the Caledonian Company ended at a point at Dumfries station. From that point, by arrangement between the Glasgow and South-Western Railway Company and the Gas Commissioners the Glasgow Company hauled the coal wagons two at a time by horses along a line of rails about 400 yards in length running along the public street to the Commissioners' premises. There was a dip and sharp ascent up to the gate of the gasworks, which it was the practice to allow the second wagon to negotiate by its own weight, and owing to a defective brake one of the workmen of the Glasgow Railway Company was killed. His widow sued both railway companies. No question arose as to the relevance of the claim against the Glasgow and South-Western Company. Lord Herschell, giving the leading judgment, thought it was altogether unreasonable to maintain that there was a duty on the part of the Caledonian Company after they had fulfilled their contract of carriage to examine the wagons and see that the brakes were fit for the subsequent journey, on which for their purposes the Glasgow and South-Western Company were going to haul them into the premises of the Gas Commissioners. "With that haulage the Caledonian Railway Company had nothing to do; their contract was at an end; it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Railway Company were altogether unconnected."

There appears to be a gulf between the case where it was unreasonable to maintain that there was a duty to examine and see that the appliances were fit for a new journey and the present case, where the duty to examine is recognized and relied on by both parties, and between the case where a railway company hands over trucks at rest to another railway company for an indefinite detention with ample opportunities for examination and the present case, where the slings are handed over for immediate return for the first party's convenience and with no reasonable opportunity for examination. Except that the contract of the first party terminated

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before the second party took part, I see no resemblance between the cases ; and in the present circumstances I cannot think that the respective contractual obligations of the parties to the shipowners and the merchants respectively govern their liabilities to one another.

For the above reasons I am of opinion that the defenders owed a duty to the deceased to take reasonable care to provide a rope fit to support the load entrusted to it. The only remaining question is whether there was a breach of this duty which caused the deceased's death. Upon this matter the learned trial judge, who had the advantage of seeing the rope in the hands of the witnesses, came to the conclusion that the pursuers had made out their case. There appears to me to have been abundant evidence to support his finding, and I can see no reason for interfering with it. I am of opinion, therefore, that this appeal should be allowed, and the judgment of the Lord Ordinary restored.

My Lords, I am requested by my noble and learned friend Lord Shaw to say that he agrees with this judgment.

VISCOUNT DUNEDIN. My Lords, I admit that at the close of the argument if I had had to deliver an opinion at once I should have been for dismissing the appeal. I was much pressed by the case of the *Caledonian Ry. Co.* (1) Further consideration and discussion with your Lordships have convinced me that the proposal from the Woolsack is right, and I also had the advantage of reading the judgment just delivered by Lord Atkin ; but I do wish to express emphatically the very narrow limits within which my concurrence is confined, for I cannot help feeling that this decision might be drawn into a precedent for what it does not warrant.

The facts are so accurately set forth by Lord Atkin that I do not need to restate them. Now, if the operation of getting the bags out of the ship's hold on to the quay could be considered as a joint operation of the stevedores and the porters, the matter would be easy. But I do not think it is possible so to view it, for it is distinctly found that the

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stevedores' actual participation in the operation ends when they deposit the bags on the steelyard. Their contract ends there. But what I think is even more determinative of the point is that, after that there are various ways of getting the bags on to the quay which depend really on the state of the tide and in the choice of which the stevedores have no part whatever. That ground of judgment being gone, one has next to consider the question from the point of view of the sling being a defective chattel that was owned by the stevedores. It is here that I am apprehensive that the judgment might be misinterpreted. As has been said, and I think rightly said, there can be no liability ex dominio solo. There is, so to speak, an element of danger in every chattel; it may break, it may be defective in such a way as to allow of misuse, and the result may be injury; but I think there must always be found somewhere the element of negligence on his part to make the owner of a chattel liable for that injury. Take the extreme instance of a loaded gun. This is so obviously dangerous when it gets into unknown hands that the law holds it to be negligence on the part of the owner to let the gun leave his possession in that state and be put in inexperienced hands.

It seems to me, therefore, that if there is to be liability one must find in the present case the same kind of element of negligence. I think one can find it, but only find it under the peculiar circumstances of the case which make it special and not easily to be drawn into a precedent. It is here that I have come to the conclusion that a distinction can be drawn between this case and the case of the *Caledonian Ry. Co.* (1), on which the judges below entirely based their judgment. If I may say so without offence, it is in the treatment of the *Caledonian Ry. Co.'s* case (1) that I find my only point of disagreement with Lord Atkin. He finds that case and this dissimilar with one point of similarity; I find them similar with one, and one only, point of difference. In both the chattel belonged to the person sought to be made liable; in both the operation, which was continuous—the delivery of the bags on to the

(1) [1898] A. C. 216.

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quay in this case and the delivery of coals into the siding in the other—was not a joint operation in the legal sense; in both the contract of the person sought to be made liable had determined at a point before the accident happened; in both there was the knowledge and acquiescence that the chattel was to be used in a subsequent operation. But the one point of difference is this—in the present case the use to which the chattel was being put was obviously dangerous, the bags were to be hoisted over the heads of men and all depended on the reliability of the slings; in the *Caledonian Ry. Co.'s* case (1) there was no obvious danger in allowing the wagon to be taken off their own line on to another for transit into a siding. There was no knowledge, so far as I can see, on the part of the Caledonian Railway Company that the brake would have to be used at all, still less a knowledge that a dangerous operation was going to be performed in which all depended on the reliability of the brake.

It is this consideration that makes me able to concur in the judgment. The stevedores knew that the sling was to be used in an obviously dangerous operation where all depended on its reliability; they knew that the only persons who could make that inspection which would ensure reliability were themselves. Out of these circumstances arises, I have come to think, duty and neglected duty, i.e. of inspection, which I think is clearly proved, and that is negligence. But I look on the case as not only narrow but peculiarly dependent on its own circumstances, and that must be my excuse for troubling your Lordships with these observations, which I have only added in case I should be thought to be pushing the idea of the liability of the owner of the defective chattel far further than I think it ought to be pushed.

Interlocutor of the First Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session to do therein as shall be just and consistent with this judgment.

(1) [1898] A. C. 216.

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The respondents to pay the costs of the action in the Inner House of the Court of Session and also the costs of the appeal to this House.

Lords' Journals, April 29, 1929.

Agents for the appellants: *H. M. Meyler & Co., for Alexander M'Clure & Morrison, Edinburgh.*

Agents for the respondents: *Holman, Fenwick & Willan, for Boyd, Jameson & Young, W.S., Leith, Edinburgh*

Applied. BENNETT v. BENNETT. [1951] 1 All E.R. 1088.

Referred to. Ross v. Ross [1950] P. 160

Applied. GAISBERG v. STORR. [1949] 2 All E.R. 411.

Referred to. GAISBERG v. STORR [1950] 1 K. B. 107

[HOUSE OF LORDS.]

HYMAN . . . . . APPELLANT;

Followed. COMBE v. COMBE [1951] 2 K. B. 215

AND

Followed. TULIP v. TULIP. [1951] 2 All E.R. 91.

H. L. (E.)* 1929 *April* 30.

HYMAN . . . . . RESPONDENT.

Divorce—Deed of Separation—Covenant by Wife not to sue for Alimony or Maintenance—Decree for Divorce on Wife's Petition—Petition for Permanent Maintenance—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190.

A wife who covenants by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by the deed, and thereafter obtains a decree for dissolution of the marriage on the ground of her husband's adultery, is not precluded by her covenant from petitioning the Court for permanent maintenance.

So *held* by the House of Lords.

Gandy v. *Gandy* (1882) 7 P. D. 168, if and so far as it conflicts with this decision, overruled.

Per Lord Shaw: *Gandy* v. *Gandy* was wrongly decided.

Decision of the Court of Appeal [1929] P. 1 affirmed.

APPEAL from an order of the full Court of Appeal (1) affirming by a majority (Lord Hanworth M.R., Scrutton, Greer and Sankey L.JJ.; Lawrence and Russell L.JJ. dissenting) an order of Hill J.

The facts are fully stated in the report of the case in the Courts below and in the opinion of the Lord Chancellor.

* *Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD BUCKMASTER, and LORD ATKIN.

(1) [1929] P. 1.

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1929. March 12, 14. *Sir Herbert Cunliffe K.C.* and *H. Durley Grazebrook* (with them *M. Josephine Clark*) for the appellant. Two reasons have been assigned in the Courts below for absolving the respondent from the obligations of her covenant: (1.) that the deed of separation ceased to operate on the dissolution of the marriage; (2.) that, assuming that the deed continued in force, the respondent, on obtaining a decree of divorce against her husband, was not precluded by her covenant from presenting a petition to the Court for permanent maintenance. As to 1: Both the husband's covenant and the wife's covenant were absolute in terms, and there was no provision in the deed terminating either of them, except in the single event of the resumption of cohabitation. This express condition negatives an implied term restricting the operation of these covenants to the continuance of the married state: *Goslin* v. *Clark* (1); *Charlesworth* v. *Holt* (2); *Wilson* v. *Wilson*. (3) The doctrine of frustration does not apply, for that doctrine assumes that the frustration arises without blame or fault on either side: *Bank Line* v. *Arthur Capel & Co.* (4); *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (5); *Malzy* v. *Eichholz* (6); *Matthey* v. *Curling*. (7)] As to 2: In *Gandy* v. *Gandy* (8) it has been decided by the Court of Appeal, reversing the decision of Sir James Hannen P. (9), that in the case of a judicial separation founded on the husband's adultery a covenant not to apply for further maintenance is binding on the wife, and, in the appellant's submission, there is no difference between a judicial separation and divorce for this purpose. By s. 190, sub-s. 1, of the Judicature Act, 1925, which is a reproduction of s. 1, sub-s. 1, of the Matrimonial Causes Act, 1907, which was itself a reproduction of s. 32 of the Matrimonial Causes Act, 1857, the Court may, on any decree for divorce, grant such sums by way of permanent maintenance or alimony "as the Court may deem to be reasonable," and by sub-s. 4,

(1) (1862) 12 C. B. (N. S.) 681.
(2) (1873) L. R. 9 Ex. 38.
(3) (1848) 1 H. L. C. 538; (1854) 5 H. L. C. 40.
(4) [1919] A. C. 435, 452.
(5) [1916] 2 A. C. 397, 422.
(6) [1916] 2 K. B. 308, 313, 314.
(7) [1922] 2 A. C. 180, 210.
(8) 7 P. D. 168.
(9) (1882) 7 P. D. 77.

which is a reproduction of the provision in s. 17 of the Act of 1857, the Court may, on a decree for judicial separation, make such order for alimony "as the Court thinks just." There is no material difference between these two enactments, and as the jurisdiction of the Court depends upon the terms of the statute the decision should be the same in each case. Lindley L.J., no doubt, suggests that the power of the Divorce Court in this respect is less in the case of a judicial separation than in the case of divorce, but that is a mere obiter dictum and is erroneous. The Master of the Rolls in the present case took the view that an agreement of the kind now in question was an attempt to shorten the arm of the Court or to oust the jurisdiction of the Court. That is a misconception. Many contracts, the effect of which was to prevent the Court from doing that which it would otherwise have done, have been upheld by the Court. In the absence in a statute of any express provision against contracting out, a free citizen is at liberty to barter away his rights as he pleases, unless he is prevented on some ground of public policy. But no question of public policy arises here. As Jessel M.R. observed in *Gandy* v. *Gandy* (1), there is no reason more dangerous to give than public policy and no reason on which so much difference of opinion exists. Public policy requires that contracts should be kept and covenants fulfilled, and the appellant is merely seeking to keep a lady to her bargain. *Morrall* v. *Morrall* (2), a decision of Sir James Hannen P., is opposed to the appellant's contention, unless it can be distinguished on the ground of incest. In the state of public opinion prevailing at that time it might be thought that incestuous adultery was such a disturbance of the family relationship that the husband must be deemed to have repudiated his contract, but unless the case can be distinguished on that ground it is difficult to reconcile it with the decision of the Court of Appeal in *Gandy* v. *Gandy* (1), and, in the appellant's submission, it was wrongly decided. *Benyon* v. *Benyon* (3) is not distinguishable

(1) 7 P. D. 168, 172. (2) (1881) 6 P. D. 98.
(3) (1876) 1 P. D. 447.

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on any such ground, and was also wrongly decided. It is said that the authority of *Gandy* v. *Gandy* (1) has been impaired by what was done by the Court of Appeal in a further litigation between the same parties, but there is no foundation for that view, because in the second case of *Gandy* v. *Gandy* (2) the application was made on behalf of the children of the marriage, and the husband declined to contribute to their maintenance; in other words, he repudiated his contract. *Wood* v. *Wood* (3) proceeds on the same ground. *Bishop* v. *Bishop* (4) and *Judkins* v. *Judkins* (4) are distinguishable, because in neither of those cases was there any covenant by the wife not to apply for further maintenance, and the observations of Lindley L.J. on the present issue were obiter only. No argument can be founded on the change in the wife's status involved in the decree for dissolution of marriage, for maintenance is not concerned with status but with the payment of money for the support of the wife and the children of the marriage, and the jurisdiction of the Court in this regard is the same in the case of a judicial separation as in the case of divorce.

[They also referred to *Reid* v. *Reid* (5); *Harriman* v. *Harriman* (6); *Ashcroft* v. *Ashcroft* (7); *Birch* v. *Birch.* (8)]

Sir Walter Schwabe K.C., *Sir James O'Connor K.C.*, *Geoffrey Tyndale* and *W. S. Adie* for the respondent were not called upon.

The House took time for consideration.

April 30. LORD HAILSHAM L.C. My Lords, this is an appeal from an order of the full Court of Appeal in England dismissing an appeal from an order of Hill J. made in a divorce suit brought by the respondent against the appellant, whereby the learned judge decided that the respondent was not precluded from prosecuting her claim for maintenance by reason of the terms of a deed of separation

(1) 7 P. D. 168, 172.
(2) (1885) 30 Ch. D. 57.
(3) (1887) 57 L. J. (P. D. & A.) 31.
(4) [1897] P. 138.
(5) [1926] P. 1.
(6) [1909] P. 123.
(7) [1902] P. 270.
(8) [1908] W. N. 81.

entered into between the parties in the year 1919. The facts are not in dispute, and may be shortly stated.

The parties were married on September 14, 1912, and cohabited for some years; there is no issue of the marriage. On September 20, 1919, a deed of separation was executed between the appellant of the first part, the respondent of the second part, Walter Hyman, who is the appellant's brother, of the third part, and two trustees of the fourth part. By the said deed the appellant covenanted for himself, his executors and administrators that he would pay two sums of 200*l.* and 2000*l.* respectively to the respondent, and that in addition he would pay to the respondent a weekly sum of 20*l.* free of income tax for her separate use and benefit and for her maintenance during her life. The payment of the 2000*l.* and of the clear weekly sum of 20*l.* was guaranteed by Walter Hyman by clause 2 of the deed. By clause 3 of the deed the respondent and the trustees covenanted that neither the respondent nor any person on her behalf should at any time thereafter molest or disturb the appellant or by any means either by taking out citation or process or by instituting any action in England or elsewhere or in any other manner compel the appellant to cohabit with the respondent, or endeavour to enforce any restitution of conjugal rights or to compel the appellant to allow the respondent any alimony or maintenance further than the said weekly sum of 20*l.* and the aforesaid sums of 200*l.* and 2000*l.* The two sums of 200*l.* and 2000*l.* were duly paid, and the appellant has regularly made the payment of the weekly sum of 20*l.*

At the time of the deed of separation the appellant was living in adultery with another woman, and he continued to live in adultery after the date of the deed. On July 18, 1923, the Matrimonial Causes Act of that year became law, whereby for the first time a wife was given the right to obtain a divorce solely on the ground of adultery by her husband. On January 11, 1926, the respondent filed her petition for divorce on the ground of the appellant's adultery during the two preceding years.

On January 25, 1927, a decree nisi was pronounced, and

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on February 7, 1927, the respondent filed a petition for permanent maintenance. On April 28, 1927, the appellant swore his answer to the petition and relied on the provisions of the deed of separation. On October 31, 1927, an order was made that the questions arising on the deed of separation be set down for hearing as a preliminary issue, and on February 10, 1928, the issue came on for hearing before Hill J., who adjourned the hearing in order that the respondent might apply to make the decree nisi absolute. On February 27, 1928, the decree was made absolute, and on March 27, 1928, Hill J. delivered judgment in the issue, and ordered that the respondent was not precluded from prosecuting her claim for maintenance by reason of the deed of separation.

In giving this decision the learned judge followed the decision of the President of the Probate, Divorce and Admiralty Division in a case of *Hughes* v. *Hughes* (1), which had been given on the previous day. The appeals in the case of *Hughes* v. *Hughes* and in this case were argued before the full Court of Appeal, and on June 18, 1928, that Court ordered that both appeals should be dismissed, and gave leave to appeal to your Lordships' House. Lawrence and Russell L.JJ. dissented from the view of the majority of the Court.

The decision of the Court of Appeal was based partly on the ground that the deed of separation on its true construction ceased to operate when the relation of husband and wife ceased to exist, and, therefore, that there was no agreement by the respondent not to bring her petition for maintenance before the Court. If this contention be well founded the obvious result is that the appeal must fail.

But the majority of the Court of Appeal further reached their decision upon the ground that, even if the respondent had covenanted in express terms not to bring the present petition, she could not be bound by such a covenant so as to preclude the exercise by the Court of its statutory power to award maintenance. This second ground of decision raises a question of far-reaching importance, and if it be correct, it is sufficient to decide the appeal.

(1) [1929] P. 1.

For the purposes of my judgment in the present case I am prepared to assume that the respondent's covenant in the deed of separation does bear the wide construction put upon it by the appellant, and does amount to a covenant not to bring the petition for maintenance, which is the subject-matter of the present proceedings. The point to be determined upon this hypothesis is whether such a covenant is effective to preclude the respondent from prosecuting her claim. It is convenient to turn first of all to the language of the statute. By s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided :—

" (1.) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable, ... and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

" (2.) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-section (1.) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable."

There follow provisos for the variation or discharge of the order.

Sub-s. 4 is in the following terms : " Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just."

These provisions are a re-enactment of provisions first appearing in the Matrimonial Clauses Act, 1857, as modified by later Acts in 1866 and 1907 ; and the question which your Lordships have to determine must, in my opinion, depend upon the view taken by your Lordships as to the true meaning and effect of this section.

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Before 1857 it was not competent for any Court to dissolve a marriage validly contracted; in order to effect such a dissolution it was necessary to have recourse to an Act of Parliament. In 1857 the Legislature for the first time gave to the Courts the power to dissolve the marriage tie by a decree of divorce. Such a decree does not merely affect the relationship of the husband and the wife one to another, but it also changes the status of each of them. In my view, the effect of the section to which I have called attention is to give power to the Court as incidental to the exercise of these powers and as a condition of their exercise to compel the husband to make adequate provision for the support of the wife. Such a provision is not made solely in the interests of the wife, but also in the interests of third parties who may deal with the wife or who may, as in the case of Poor Law Guardians, become responsible for her sustenance. If this be the proper inference from the language of the statute, I am prepared to hold that the parties cannot validly make an agreement either (1.) not to invoke the jurisdiction of the Court, or (2.) to control the powers of the Court when its jurisdiction is invoked.

In the present case the husband agreed to make a large money payment at the date of the deed of separation and to make a substantial weekly payment for the maintenance of his wife during her life; and, as an additional advantage, the wife obtained the guarantee of Mr. Walter Hyman for the due observance of these obligations. But your Lordships are not now being invited to consider whether the provision in the deed of separation is adequate; the only question which is before your Lordships' House is whether or not the existence of the wife's covenant in the deed of separation precludes her from making any application for maintenance. For this purpose, it can make no difference whether the consideration given by the husband was adequate or not; the question of principle would be the same if there had been no weekly payment provided at all. In my opinion, the fact that the deed of separation has been entered into by both parties, the fact that it was executed by the wife

voluntarily and upon independent legal advice, the fact that the wife was prepared to accept the provision then made as adequate at the time, the benefits which she obtains in the shape of the guarantee by Mr. Walter Hyman and in the continuance of the weekly payments after her husband's death, all form part of that conduct of the parties which by the express terms of the statute is to be taken into account by the Court in determining what it thinks reasonable. It may very well be that when the facts come to be investigated, the Court will say that a sum of this magnitude, so secured, voluntarily accepted as a sufficient maintenance ten years ago, and faithfully paid ever since, is a sufficient provision, and that the Court will not deem it to be reasonable to order any further payment to be made: this is not the question which your Lordships are considering. The only question which the order appealed against determines is that the existence of the covenant in the deed of separation does not preclude the wife from making an application to the Court; this by no means implies that, when the application is made, the existence of the deed or its terms are not most relevant factors for consideration by the Court in reaching a decision.

Your Lordships will observe that I have, so far, based my opinion on the language of the statute without reference to any reported decisions; but counsel for the appellant called your Lordships' attention to several cases, and it is necessary now to examine those cases and to see whether the view which I have formed upon the language of the statute must be modified in the light of those decisions.

A large number of authorities was brought to the attention of your Lordships, most of which are discussed in the very exhaustive judgments in the Court of Appeal; but there are three cases which require particular attention—namely, *Morrall* v. *Morrall* (1); *Gandy* v. *Gandy* (2); and *Bishop* v. *Bishop*. (3)

In *Morrall* v. *Morrall* (1) a wife by a deed of separation had agreed to accept certain sums as provision for her support,

(1) 6 P. D. 98, 100 (2) 7 P. D. 168, 172, 174, 175.
(3) [1897] P. 138.

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and had covenanted not to commence or prosecute any suit or other proceeding for compelling her husband to allow her any support, maintenance or alimony whatsoever, except the sum stipulated in the deed. At a subsequent date the wife discovered that her husband had been guilty of incestuous adultery, and obtained a decree for the dissolution of the marriage. The President, Sir James Hannen, held that notwithstanding the deed she was entitled to the usual order for permanent maintenance. The learned President says in his judgment: "When she has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them an allowance based upon her husband's actual income."

In the case of *Gandy* v. *Gandy* (1) a wife and a husband had executed a separation deed by which the husband agreed to allow to the wife 250*l.* a year and to maintain the two youngest children, who were not given into her custody, and the wife covenanted not to take any proceedings to compel the husband to allow her any larger amount of alimony. Subsequently the husband committed adultery, and the wife obtained a decree for judicial separation and an order for the custody of the two youngest children. The wife applied for alimony, and the President (following an earlier decision of his own) held that she was entitled to an inquiry as to the husband's means, and that she was not precluded by her covenant from making the application. The husband appealed to the Court of Appeal, and the Court of Appeal reversed the President's decision. Sir George Jessel said that in his view the Court could not interfere with such a contract except when one of the parties to the contract had so acted as to disentitle him to rely upon the contract at all, and that the subsequent misconduct of the husband did not entitle the wife to repudiate the contract into which she had entered, which was therefore still binding. Cotton L.J. said that in

(1) 7 P. D. 168, 172, 174, 175.

his opinion the conduct of the husband since the deed was not such as, having regard to what was known to the wife at the time she entered into the deed, to disentitle him from relying on the deed. The learned Lord Justice goes on to deal with the case of *Morrall* (1), and he distinguishes it in this way: "There, there was a deed of separation with a provision as to what maintenance the wife was to have. She subsequently ascertained that the husband was living in incestuous adultery. It may well be that such gross misconduct, misconduct of a nature so entirely different from that which the parties were providing for when they entered into the deed of separation, might prevent the husband from in any way relying on that deed, and might render it just that the bargain made by the wife for maintenance should be disregarded on an application to the Court for alimony. Here, in my opinion, the circumstances are not such as to entitle the wife to disregard her bargain." Lindley L.J. says: "This being only a suit for judicial separation, the power of the Divorce Court over these deeds is much less than it would be after a decree for dissolution of marriage. It is a much more restricted jurisdiction and power, and it appears to me that the cases, of which *Morrall* v. *Morrall* (1) is one, where the Divorce Court has dealt with separation deeds after decrees for dissolution of marriage, are rather misleading, when they are applied, or sought to be applied, in a case where the Court has no such extensive jurisdiction."

In *Bishop* v. *Bishop* (2) the facts were that by an agreement for separation made between husband and wife on the withdrawal of the wife's petition for divorce, the wife agreed to accept from the husband a specified sum for maintenance to be paid in any event, whether the marriage should thereafter be dissolved or not. The agreement contained no express stipulation not to petition for permanent maintenance. The wife brought a fresh petition for divorce, based on the misconduct of the husband after the date of the agreement, and obtained a decree. She thereupon filed a petition for permanent maintenance, and the husband set up the agreement

(1) 6 P. D. 98. (2) [1897] P. 138, 162, 163, 164.

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as a bar. Sir Francis Jeune, the President, held that the agreement was not a bar to the petition, and his judgment was upheld in the Court of Appeal. The judgment of the Court of Appeal was delivered by Lindley L.J., and the case of *Gandy* v. *Gandy* (1) was carefully examined and distinguished. The learned Lord Justice points out that in that case "nothing was decided respecting any of the statutory powers of the Divorce Court in suits for dissolution of marriage." And again he says: "The case being one of dissolution of marriage, and not of judicial separation, *Gandy* v. *Gandy* (1) is not in point, except in so far as it negatives any implied condition of continued chastity. The present case must turn on the power of the Divorce Court on a dissolution of marriage to compel a husband to provide for his divorced wife, and to make orders for the maintenance and education of the children," and after referring to the statute, he says: "As regards permanent maintenance, s. 32 of the Act of 1857" (which is now reproduced in s. 190, sub-s. 1, of the Act of 1925) "is very wide indeed, and it would not be right for this or any Court to put a narrow construction upon it, or to fetter in any way the Court or judge intrusted with its application in cases of divorce. The section says that regard is to be had to the wife's fortune, to the ability of the husband, and to the conduct of the parties. The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right." And again lower down on the page: "We are not aware of any authority since the Divorce Act which shows that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognized. There is no express covenant to that effect in the present case; and a covenant of such very questionable validity certainly cannot be implied. In other words, the wife cannot be held to have precluded herself by her agreement from invoking the aid of the Court

(1) 7 P. D. 168.

to obtain further maintenance in the events which have happened."

Your Lordships will have noticed that the decisions in *Morrall* (1) and in *Bishop* (2), so far as they are relevant, tend to confirm the opinion which I had formed from the language of the statute, and to support the view that a covenant not to invoke the jurisdiction of the Court to order permanent maintenance in a suit for dissolution of marriage is not a bar to such an application being made. But counsel for the appellant relied strongly upon the case of *Gandy* v. *Gandy*. (3) He argued that the Court of Appeal in *Gandy* v. *Gandy* was mistaken in supposing that the jurisdiction of the Court in suits for judicial separation was less than it would be after a decree for dissolution of marriage. He urged that the considerations which are expressed in sub-s. 1 of s. 190 as matters to be taken into account by the Court are the very matters which it had been the established practice of the Ecclesiastical Courts to take into account in awarding alimony in suits for judicial separation; he said that there was no difference in meaning between what the Court "deems reasonable" in sub-s. 1, and what the Court "thinks just" in sub-s. 4. He pointed out that although *Gandy* v. *Gandy* (3) had subsequently been considered in another suit between the same parties (4), there was nothing in the second decision to shake the authority of the first, and he said that the principle of the first decision was inconsistent with the decision in the present case, and therefore that the present appeal ought to succeed.

I confess that the argument so presented appeared to me a very formidable one. Your Lordships did not think it necessary to call upon counsel for the respondent; and it may be that there are distinctions between *Gandy* v. *Gandy* (3) and the present case to which our attention has not been directed, and that the fact that in *Gandy* v. *Gandy* (3) the Court had only decreed judicial separation, whereas in the present case it had dissolved the marriage altogether, may

(1) 6 P. D. 98.
(2) [1897] P. 138.
(3) 7 P. D. 168.
(4) 30 Ch. D. 57.

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make such a difference in principle as to render the two cases distinguishable. But if the two cases cannot be distinguished then in my opinion the result is that *Gandy* v. *Gandy* (1) must be held to have been wrongly decided. However this may be, it is sufficient for the decision of the present case to hold, as I do, that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction. In my opinion this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT DUNEDIN: My Lords, I have come to the same conclusion. I have had the advantage of seeing the opinion which will presently be delivered by my noble and learned friend Lord Buckmaster, and I concur with it.

LORD SHAW OF DUNFERMLINE. My Lords, the parties to this case were married on September 14, 1912. There are no children of the marriage. On September 20, 1919, they executed a deed of voluntary separation. By that deed the husband covenanted for himself, his executors and his administrators to pay to his wife certain sums down and a further sum of 20*l.* per week during her life. It was by this deed of separation provided that: "Neither the wife the said May Hyman, nor any person on her behalf, shall at any time hereafter molest or disturb the said Maurice Percy Hyman by any means, either by taking out citation or process or instituting any action in England or elsewhere or in any other manner compel the said Maurice Percy Hyman to cohabit with her or endeavour to enforce any Order for restitution of conjugal rights, or to compel the said Maurice Percy Hyman to allow her any alimony or maintenance further than the said weekly sum of 20*l.* and the aforesaid sums of 200*l.* and 2000*l.*"

(1) 7 P. D. 168.

On January 11, 1926, the wife petitioned for a divorce on the ground of her husband's adultery, and she obtained a decree nisi on January 25, 1927, which was made absolute on February 27, 1928.

The question in the case is whether the covenant by the wife not to take proceedings to compel her husband to allow her any alimony or maintenance beyond the amount stipulated in the deed is still binding upon the wife after she has obtained a decree for divorce. Conversely put, the question is whether it is still open to her to petition for maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. By that Act, s. 190, it is provided that: "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable. . . . ." As showing the range and scope of the duties vested in the Court, it may be expedient to quote certain further provisions of the Act. Sect. 192 is as follows: "The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage."

The Court is further vested with power to vary orders. By s. 196 it is provided that: "The court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any

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part of the money ordered to be paid, and subsequently revive it wholly or in part, as the court thinks just."

Had the arguments in this case not roamed very wide, it would have been needless to observe that this is not a case as to judicial separation, or any application for alimony following therefrom, or as to restitution of conjugal rights ; it is simply an application for alimony following a dissolution of the marriage by divorce. In various cases much argument has been had as to the rights of an applicant for judicial separation who was already under contract of voluntary separation. That is not the situation of the respondent in the present case, which is different, and has been over and over again distinguished by the Courts from, a case of an application following divorce.

The substance of the statutory provisions cited from the Judicature Act of 1925 had already appeared in previous statutes. The language of the earlier portion of s. 190 is a repetition of s. 32 of the Matrimonial Causes Act, 1857. No further tracing of the legislative history is necessary. The power given to the Court depends fundamentally on the language of s. 190 of the Act of 1925.

I am humbly of the opinion that the Court granting divorce is charged, and charged fully, under that section with the power of settling the allowance to the wife, and that it is not precluded from discharging that duty by the existence of the provisions of a voluntary deed of separation between the parties.

Upon that subject I am in entire agreement with the judgment of my noble and learned friend on the Woolsack. The ruling provision—s. 190 above quoted—empowers the Court, if it thinks fit, "on any decree for divorce or nullity of marriage " to make an order securing to the wife such a gross annual sum of money not exceeding her life, as having regard (1.) to her fortune, if any, (2.) to the ability of her husband, and (3.) to the conduct of the parties the Court may deem reasonable. Not only is the power given to the Court, but the scope of the power and the considerations which are to be taken into account when it is exercised are set out by statute.

I do not think it to be competent for us to limit or restrict that power which is thus given unambiguously and definitely. Nor is it legitimate for a Court of law to be swayed from such a construction by a consideration of authorities applicable to previous legislation, although that legislation was in similar terms. In short this is the simple case—over and over again affirmed by this House—that the statute must be taken to mean what it says, and that there is much danger in allowing invasion of its terms followed by subsequent invasions succeeding the first until the virtue of the statute is emasculated.

It seems, however, to be impossible to avoid the wider discussion which took place in the course of the able and careful argument for the appellant and upon which the dissentient judgments in the Court of Appeal were founded.

I have had the advantage and pleasure of perusing the opinion of the Lord Chancellor, and I may say that I am at one with him in his analysis of the authorities—so much so that I think it unnecessary, in view of his pronouncement, to trouble the House with a judgment which I had prepared upon that subject. It may be, however, that our views do not exactly coincide as to *Gandy* v. *Gandy* (1), and in that situation, my Lords, I am venturing to deal particularly with that case and also with the underlying principle applicable to the whole situation.

I do not conceal from your Lordships that I think the judgment of the Court of Appeal in the first case of *Gandy* (1) was—I say so quite boldly—an erroneous judgment. It was contrary to that of Sir James Hannen, whose decision appears to me to be upon the authorities which he cited and upon principle essentially sound. I will quote one or two sentences from that judgment which appear to me to have expressed the law of England with accuracy at the time they were spoken, and undoubtedly to express the law of England to-day.

Gandy (1) was a case in which a voluntary separation under agreement had been made by the married parties, and

(1) 7 P. D. 168.

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thereafter the wife obtained a decree for judicial separation in consequence of the husband's adulterous misconduct. It was not a case like the present, where in respect of that misconduct a divorce had been obtained. Probably enough the misconduct was not accompanied with cruelty, and so the right to sue for such a remedy at that date was not in the wife.

That difference—between applications for alimony in divorce cases and in separation cases—was over and over again noted by the judges of the Court of Appeal themselves in *Gandy* (1), but *Gandy* has always somehow played a formidable part in the discussions as to alimony even in divorce cases. The reason for that has, so to speak, been brought up to date and forcibly stated by Lawrence L.J. in his dissent in the present case. He says (2) :—

"The conclusions of the Court of Appeal in the first case of *Gandy* v. *Gandy* (1), therefore, may be summarized as follows : that a wife's covenant not to endeavour to compel the husband to allow her any further alimony or maintenance is a valid covenant binding on her ; that no dum casta clause will be implied in a separation deed, and consequently that the husband can enforce the covenant notwithstanding his subsequent adultery, which does not amount to such gross misconduct on his part as to disentitle him to relief in a Court of equity ; and that the fact that the wife has obtained a decree for judicial separation with the result that the spouses are no longer living apart by agreement but by the decree of the Court upon the making of which the Court has a statutory power to make such order for alimony as it thinks just, affords no ground for enabling the Court to disregard the wife's covenant," and he adds : "In my judgment these conclusions and the reasons upon which they are founded apply just as much to a case like the present, where the wife has obtained a decree for divorce, as they do to the case where the wife has obtained a decree for judicial separation."

This appears to make the way of error luminous. *Gandy* (1) is assumed to be sound, and not only sound, but to have such soundness and fundamental principle as to enable it to be

(1) 7 P. D. 168. (2) [1929] P. 55.

quoted effectively not in a separation case but in a divorce case, and with the result that it contracts parties to a divorce case out of the provisions of an Act of Parliament, and impedes and cripples the power of Courts of law in settling alimony in such cases upon the grounds comprehensively and definitely set forth by statute. In my opinion the whole of this reasoning is a mistake.

But I think it right to begin at the beginning by saying that I do not think that *Gandy's* case (1) was rightly decided. I am of opinion that the decision was wrong, and I am pretty well assured in that opinion by the course of subsequent English decisions.

Sir James Hannen, President of the Probate Court, declined to accept the argument, even in a separation case, that a married person was bound by a voluntary contract from asking a judicial remedy both of separation and of allowance of alimony. Quoting from his own judgment in *Benyon* v. *Benyon* (2), he says it would be an evil example and morally dangerous if the wife's pecuniary position could not be altered by reason of her adultery subsequent to her husband's acceptance of an allowance. "In this changed condition of things," he says (3), "I think the husband is entitled to ask for a larger allowance than he agreed to accept at the time of the separation." He then refers to *Morrall* v. *Morrall* (4), to which he adheres, *Morrall* being a case in which a decree of the dissolution of the marriage had been pronounced. Thereupon he adds these sentences :—

"It was argued that these cases are not applicable, because in each of them the marriage of the parties was dissolved, and thus a change of their status was effected. But if the reasons on which my judgment in those cases rests are well founded, I am of opinion that they are equally applicable where the wife has become entitled to a decree of judicial separation." He adds : "After much consideration, I remain of opinion that to adopt the opposite conclusion would not only be to make the general words of the contract extend to

(1) 7 P. D. 168.
(2) 1 P. D. 447.
(3) 7 P. D. 77, 81, 82.
(4) 6 P. D. 98.

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a state of things not in the contemplation of the parties, but would lead to results in a high degree prejudicial to morality, it would be, in fact, to hold that a husband who has entered into an agreement with his wife to live apart, making her a certain allowance, obtains thereby a licence to commit adultery for the rest of his life without subjecting himself to any liabilities beyond those imposed by the deed." And he concludes: "It appears to me that in all cases such as this it is implied in the contract contained in the deed that it has reference only to the parties living separated, without more, and not to their living apart in a state of adultery."

As will be seen presently, I go further, and hold that the words in this opinion which suggest the possible idea that the parties were openly consenting in their voluntary deed to a known life of adultery being continued is no argument in defeat of the principle of rejecting such a deed as a bar to the performance of its statutory duties by the Court. I think, on the other hand, that the deed so proponed as expressive of such knowledge and consent, is more subject to objection and repudiation than the other. I shall recur to that topic presently.

The gist of the Court of Appeal's decision of the first *Gandy* case (1) is plainly stated by Sir George Jessel M.R.: "In the case of dissolution of marriage the Court has had conferred upon it the right to vary not only post-nuptial but ante-nuptial settlements, and to deal with them in any way which may be thought just and expedient. But in the case of judicial separation, there being no such power, the deed remains binding. The wife is entitled to the annuity secured her by the deed, the husband is liable to pay the annuity. . . . . Why should the Court interfere with the contract? I see that the learned judge put it on the ground of public policy. I have explained more than once, and especially in a case which has been referred to by the learned judge himself of *Besant* v. *Wood* (2), that there is no reason more dangerous to give, and no reason on which such difference of opinion exists, as public policy. He has said: 'If you do

(1) 7 P. D. 168, 172. (2) (1879) 12 Ch. D. 605.

not allow the wife to ask for increased alimony in such a case as this you allow the husband to commit adultery with impunity.' I am by no means prepared to say that this remark is correct. It is not impunity merely because he is not obliged to pay more money. I do not consider that payment of alimony is the only punishment for adultery if the word 'punishment' should be used in connection with it. . . . . It appears to me a very strong thing to say that by his committing an act which does not affect the wife either directly or indirectly her rights to participate in his fortune should be altered. . . . . It seems to me that, having regard to the relative positions of the husband and wife, there has not been misconduct on the part of the husband so affecting the position of the wife as to entitle her to repudiate the contract she entered into, therefore the contract is still binding and the appeal must be allowed." My Lords, I respectfully disagree with such doctrine. The wife in the case figured cannot legitimately be treated as merely repudiating the voluntary contract of separation. The violator of the essence of such contract, the true repudiator, was the husband himself, and it is the wife's position to found upon his conduct amounting to such repudiation. There are two ways of it. The contract either contemplated, or it did not, adulterous conduct subsequent to its date. If it did not, such conduct not in contemplation and not provided for opens legitimately and effectively the attack upon the continuance of the contract as mutually binding. If, however, it did contemplate such misconduct, and this whether expressly or by implication, then, in my opinion, it was a contract immoral in its nature, opposed to the fundamental sanctity of marriage and contrary to the law of England. It was a species of condonation ab ante.

Such a condonation is unknown to the law. Were it supported, it would be equivalent not to condonation; condonation is of the past. It would be equivalent to an indulgence for the future—an indulgence obtained or purchased for mutual convenience or for money—that the marriage tie should be maintained and yet its obligations defied.

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This indulgence is claimed in the name of the sanctity of contract. But in my opinion the law of England would not uphold the sanctity of any contract the plain object and effect of which is to undermine the sanctity of marriage, for this would be contrary to and subversive of one of the fundamental elements upon which society itself is based. *Gandy* (1) has been a confusing and troublesome decision, and it has been roughly handled by the Courts, and such weight as it ever had has, in my opinion, long been lost. I refer in particular to *Bishop* v. *Bishop* (2) and *Judkins* v. *Judkins* (2), both of which are rightly and highly approved by the majority judges below, and I note with respectful agreement the review of the cases in the judgment by the Master of the Rolls. In the judgment in *Hughes* v. *Hughes* (3) Lord Merrivale puts the point alluded to above thus: "No doubt an express undertaking by a wife, in this country, that she would not sue her husband for maintenance if he should be guilty of adultery would be held to taint with immorality a contract of which it should be found to have formed part." I agree with that, and Lord Merrivale would no doubt assent to the view, which I think also sound, that this would apply whether the undertaking was expressed or was inferred by implication.

The true principle is that whenever the aid of a Court is invoked to grant a judicial allowance and there is presented to it an agreement as in bar of the exercise of the right or the discharge of the duty under statute then the Court is bound to look at such an agreement and to decline to be turned from the performance of its judicial duty or the exercise of its judicial rights when the agreement so tabled is of a nature repugnant to and defiant of those obligations which are inherent in the sanctity of marriage itself. To hold otherwise would bring the law into confusion and Courts into contempt, for, as already indicated, it would be using Courts of law for purposes essentially subversive of society.

It will be seen, my Lords, that the principle, so put, applies

(1) 7 P. D. 168. (2) [1897] P. 138.
(3) [1929] P. 1, 10.

all round, that is to say, not only to applications for alimony in cases of divorce but in those also of judicial separation. The authors of the *Gandy* doctrine themselves confined it to the latter and disclaimed its application to the former. Yet here it is again—and in a divorce case application. I will not further dwell upon the merits of *Gandy*: it had none. Nor could I be even now sure of its final disappearance. For nothing will apparently avail—not the judgment of this House, not even the words of an Act of Parliament—to stay the spade of the legal resurrectionist.

LORD BUCKMASTER. My Lords, the facts in this case are plain, and need no repetition. The judgment appealed from can be supported on either one of three independent grounds :—

(1.) That the covenant by the respondent in clause 3 of the deed not to take steps to compel the appellant to allow her any "alimony or maintenance" beyond the covenanted sums did not apply to her rights arising on divorce.

(2.) That the covenant if applicable to divorce was void in law as contrary to public policy.

(3.) That it was impossible by covenant to exclude the statutory rights in favour of the wife arising on divorce.

The first of these points is special to this case, and a decision resting upon it alone would leave the general and important question untouched. None the less I think it well to say that in my opinion the respondent's contention upon it is right. At the date of the deed, after the separation of the parties, previous cruelty not being suggested, divorce was at the wife's instance impossible, except upon grounds which, apart from bigamy, are so revolting and fortunately so rare that it may be safely assumed they were outside the consideration of the parties. At the date of the deed, therefore, so far as the wife's position was concerned, the only contemplated dissolution of the marriage was by death. It would, therefore, be indeed an astonishing thing if the wife's covenant were to be construed as relating to a set of circumstances that no one thought would arise. Nor is there anything in the covenant that could properly apply to a

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condition of divorce except the two words "alimony" or "maintenance," which strictly refer to the names used in the statute for the allowance made to a woman, as to alimony while the marriage tie continues, and as to maintenance when it is unloosed. To my mind this fact is wholly insufficient to displace the considerations to which I have called attention. If this clause was intended to operate on (*a*) The husband committing bestiality, bigamy, rape, sodomy or incest—the only grounds on which the wife could, after separation, obtain divorce—or (*b*) An enlightened Legislature at an unknown future date enabling a woman to obtain divorce on the ground of adultery alone, it was in my opinion necessary that it should be plainly expressed by words or irresistible inference, and this the deed has wholly failed to do—the phrase "alimony or maintenance" is, in my opinion, a legal pleonasm rather than a legal exactitude. On the first point, therefore, I think the appeal fails.

The second case is more difficult. The case of *Gandy* v. *Gandy* (1) is a clear authority for the proposition that provisions in a deed framed so as to operate after the commission of adultery are not ipso facto void. It is unnecessary to examine this authority, but I think this doctrine must be very narrowly confined. A deed based upon a contemplated adultery would, I apprehend, be certainly bad, and so also would be a deed so framed as upon its face to show that adultery would bring a positive advantage to the wrongdoer.

It is not in my opinion necessary to proceed further and examine if *Gandy* v. *Gandy* (1) is good law, since I agree with the view expressed by Lindley L.J. in *Bishop* v. *Bishop* (2), in a passage already quoted, and I should hesitate a long time before I differed from a considered opinion expressed by that learned judge, but in this case hesitation is unnecessary.

In 1857 divorce was for the first time placed within the jurisdiction of the Courts. Before that date it was only obtainable by Act of Parliament, and in such Act it was competent to introduce whatever provisions Parliament

(1) 7 P. D. 168. (2) [1897] P. 138, 163.

thought fit for protecting or penalising either party. Divorce wholly differs from any form of separation. Judicial separation, which has been the subject of much learned and weighty censure, is nothing but enforcing through an order of the Court an arrangement which the parties could—were they willing—equally effect for themselves; it merely makes in the form and with the force of a decree an arrangement for the parties to live apart, but divorce destroys the whole relationship, and only by remarriage can it be restored. It is, in my opinion, associated with and inseparable from the power to grant this change of status that the Courts have authority to decree maintenance for the wife. And in the exercise of this authority they are in no way bound by the contracts made between the parties though, as pointed out by the Lord Chancellor, the consideration of all contractual rights possessed by the wife must be borne in mind.

LORD ATKIN. My Lords, it is unnecessary to recapitulate the facts. We have to deal with a separation deed, a class of document which has had a chequered career at law. Not recognized by the Ecclesiastical Courts, such contracts were enforced by the common law. Equity at first frowned. Lord Eldon doubted but enforced them: cf. *St. John* v. *St. John* (1) and *Bateman* v. *Countess of Ross* (2); and see the arguments of Sir Fitzroy Kelly and Mr. Turner and of Mr. Bethell in *Wilson* v. *Wilson*. (3) Finally they were fully recognized in equity by Lord Westbury's leading judgment in *Hunt* v. *Hunt* (4), in which he followed Lord Cottenham's decision in *Wilson* v. *Wilson* (3), where his argument for the respondent had prevailed. Full effect has therefore to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial Courts seems to suggest that at times they are still looked at askance, and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved

(1) (1803) 11 Ves. 525, 529.
(2) (1813) 1 Dow 235.
(3) 1 H. L. C. 538, 550–553, 564, 565.
(4) (1861) 4 D. F. & J. 221.

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and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy.

Endeavouring therefore to apply the ordinary law of contract to the agreement in question, as at present advised I should find it difficult to agree with the view that has found favour with some of the learned judges below, that on the true construction of the contract it is only intended to operate during the joint matrimonial life of the parties, so that its provisions terminate on divorce. This construction appears to be untenable in view of the fact that the husband's covenant for payment expressly binds his executors, and necessarily and no doubt intentionally operates after his death during the life of the widow. I may add that this separation deed appears to be in an usual form ; and it would be an unfortunate result if this House had been compelled to come to the conclusion that agreements so drawn ceased to operate on dissolution of marriage. There must be many cases of wives who have obtained divorces who still draw the separation allowance who would find it difficult or impossible now to obtain a maintenance order for the same or any amount. It would also in the case of such deeds be impossible to obtain any variation of them as marriage settlements, for they would have ceased to operate with the dissolution of the marriage. The practice has been to regard them for this purpose as continuing after the divorce: see *Worsley* v. *Worsley* (1), though no doubt in that case there were express provisions that the deed should continue to operate after the death of the husband.

I have also difficulty in accepting the view which found favour with other of the learned judges below, that the agreement was dissolved by what is now known as "frustration."

(1) (1869) L. R. 1 P. & M. 648.

I am in some doubt as to the event which is said to produce this result—whether it is the passing of the Matrimonial Causes Act, 1923, or the commission by the husband of adultery since the passing of the Act or the decree absolute which dissolved the marriage. If the last, then a subsequent divorce would dissolve and have dissolved all separation deeds, whether before or after the Matrimonial Causes Act, whether the parties so desired or not. I cannot myself think that the event of divorce is something so unforeseen, or the continuance of the marriage tie so essentially a condition of the contract that the dissolution of the marriage can properly be treated as automatically dissolving the provisions for paying the allowance. I find myself the less able to believe that the law should now impute this implied condition to the parties, or impose it on the contract, whichever be the correct formula, when I find that fifty-four years ago, in *Charlesworth* v. *Holt* (1), the Court of Exchequer held the contrary; and that separation deeds must have been drawn on this footing ever since. For myself I am satisfied that the words of the wife's covenant not to compel an allowance of further alimony or maintenance indicate that the parties' advisers had the possibility of divorce in their minds, the two words being especially appropriate to judicial separation on the one hand and divorce on the other. And on this point *Worsley* v. *Worsley* (2), to which I have referred above, is a relevant authority.

If on the other hand the frustration is confined to this particular case and the unforeseen event of the passing of the Act of 1923, I cannot think that this alteration of the law can have the destructive effect on the contract which is suggested. All that the Act did was to enable the wife to obtain a dissolution for simple adultery, which before she could only obtain for adultery together with some additional fact. But before the Act and during the separation deed the existing law provided grounds for divorce which might have resulted had the facts been so in a dissolution of this marriage, incestuous adultery, bigamy, adultery with cruelty, and indeed

(1) L. R. 9 Ex. 38. (2) L. R. 1 P. & M. 648.

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all the other grounds other than adultery with desertion. It seems to me unreasonable to think that the separation deed remained operative if effect was given to the existing law, but that the basis of the contract fell away if divorce became easier, some of the grounds still remaining the same. The change in the law did not make the performance of the contract either impossible or more difficult. Indeed it did not necessarily affect it at all.

In view of the effect of the doctrine of frustration in the automatic destruction of contracts in spite of the will of the parties, and of the caution which is required before applying still more before extending the doctrine, I should be reluctant to decide this case against the respondent on this ground, though as we have not heard the respondent I do not express a final opinion upon it.

I think, however, that the wife is entitled to succeed upon another ground. Her marriage has been finally dissolved upon her petition. The Legislature has invested the matrimonial Courts in such a case with powers to make such provision for the future maintenance of the wife as the Court may think reasonable. Some powers were given by the Matrimonial Causes Act of 1857. They have been extended by the Acts of 1866 and 1907, and are now contained in ss. 190–192 of the Judicature Act of 1925. The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay her an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court. But the duty of the husband is also a public obligation, and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts. When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her

maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the Court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true, the powers of the Court in this respect cannot be restricted by the private agreement of the parties. "Quilibet potest renunciare juri pro se introducto." "I beg attention to the words 'pro se,'" says Lord Westbury in *Hunt* v. *Hunt* (1), "because they have been introduced into the maxim to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation." To apply another maxim, "Privatorum conventio juri publico non derogat." In my view no agreement between the spouses can prevent the Court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, "having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties." The wife's right to future maintenance is a matter of public concern, which she cannot barter away. This is not to say that in any particular case the Court must make an order; still less that in this case it must do so. I could well understand the Court coming to the conclusion that the parties' pre-estimate of the wife's reasonable needs was judicious, and that the allowance, continuing as it does after the husband's decease, and being independent of any fluctations in the amount of his fortune, needed no supplement. But the present objection of the husband to the Court considering the matter at all in my opinion cannot prevail.

In argument the case of *Gandy* v. *Gandy* (2) was pressed upon us as an authority of the Court of Appeal upholding the validity of a covenant in similar terms in a case where the wife had obtained a decree for judicial separation. In that case the argument against the validity of the covenant seems to have proceeded on the grounds accepted by

(1) 4 D. F. & J. 221, 233. (2) 7 P. D. 168.

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Sir James Hannen, that the deed was subject to an implied condition that neither party should commit adultery: or that the conduct of the husband in committing adultery was a repudiation of the deed which the wife could accept: or that, if this were not so, the deed was a licence to commit adultery, and so would be void as being against public policy. The Court of Appeal in my judgment rightly rejected all these contentions. The particular ground that the wife could not make a valid agreement to prevent the Court from considering a claim for future alimony on the ground that she might thereby be depriving herself of any support does not appear to have been considered by the Court. It is, I think, sufficient to say that there is such an obvious distinction between judicial separation and divorce, between the continuance of the marriage tie and its dissolution, and the rights of the spouses in the two events, that the decision may possibly be supported notwithstanding our conclusion in the present case. In view of the course of the discussion about this case I do not feel justified in saying more than it may hereafter be distinguished. If it prove incapable of distinction, so far as it conflicts with the decision in this case, it must be considered to be overruled.

I am of opinion that this appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 30, 1929.

Solicitors for the appellant: *John B. & F. Purchase & Clark.*

Solicitors for the respondent: *Heywood & Ram.*

[PRIVY COUNCIL.]

MAINE AND NEW BRUNSWICK ELECTRICAL POWER COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ALICE M. HART . . . . . RESPONDENT.

J. C.* 1929 *May* 13.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Interest—Statutory Power to allow Interest—Sum certain payable at certain Time — Amount and Time depending upon contingent Events — Judicature Act, 1909 (9 *Edw.* 7, *c.* 5, *New Brunswick*), *s.* 24, *sub-s.* 1 — *Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42, *Imp.*), *s.* 28 — *Rule of Equity as to Interest—Executed Contract—Construction of Covenant—Land conveyed for Power Works—Payments depending upon Power developed.*

When an instrument provides for future payments, but the time for payment, and the amount (if any) payable, both depend upon contingent events, there is not "a sum certain payable by a written instrument at a certain time" so as to enable interest to be allowed under s. 24, sub-s. 1, of the (New Brunswick) Judicature Act, 1909, the language of which is not distinguishable from that in s. 28 of the (English) Civil Procedure Act, 1833, known as Lord Tenterden's Act.

Juggomohun Ghose v. *Manickchund* (1859) 7 Moo. I. A. 263 followed.

Merchant Shipping Co. v. *Armitage* (1873) L. R. 9 Q. B. 99, 114 and *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* [1892] 1 Ch. 120, [1893] A. C. 429 discussed.

When a contract for the sale of land has been fully executed, an assignee of a covenant for future payments, entered into by the purchaser as part of the consideration, is not entitled by any rule of equity to interest upon sums becoming due under the covenant; there is nothing to attract the equitable jurisdiction, and the parties are left to their remedies at law.

Land, and water rights, were conveyed to the appellants for the purpose of developing water power, the appellants covenanting that if power to a greater extent than 2000 horse power should at any time be developed and used they would pay to the vendor, his successors and assigns, $8 for each horse power in excess of 2000, the excess to be treated as divided into units of 500, and each unit to be immediately paid for in entirety when any part thereof had been developed and used. The conveyance was pursuant to a contract made in consideration of shares in a company transferred to the vendor and of the execution of the above covenant. The appellants for the first time on

* *Present:* LORD HAILSHAM L.C., LORD CARSON, LORD BLANESBURGH, LORD ATKIN, and LORD TOMLIN.

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January 10, 1918, and on several later occasions, developed and used power in excess of 2000 horse power. The respondent, an assignee of the benefit of the covenant, sued the appellants, claiming payments thereunder together with interest:—

Held, that upon the true construction of the covenant the appellants were chargeable from time to time upon the maximum peak load once reached, whether the average developed power taken over a year, or other period, did or did not exceed 2000 horse power; but that, for the reasons stated above, the respondent was not entitled to interest upon the sums due, either by statute or in equity.

Attorney-General for Ontario v. *Canadian Niagara Power Co.* [1912] A. C. 852 followed.

Judgment of the Supreme Court of New Brunswick varied.

APPEAL (No. 78 of 1928) from a judgment of the Appeal Division of the Supreme Court of New Brunswick (March 26, 1928) dismissing the defendants' appeal, and allowing the plaintiff's cross-appeal from a judgment of Byrne J. (October 20, 1927).

The action was brought in the Supreme Court of New Brunswick by the respondent, as assignee from H. McC. Hart of the benefit of a covenant entered into by the appellants upon the conveyance to them in 1905 by H. McC. Hart of certain land and water privileges for the purpose of the construction of water power works. By her statement of claim the respondent claimed to be paid under the covenant in respect of all excess of horse power beyond 2000 developed and used by the appellants at $8 per horse power, in units of 500; she claimed also interest upon the sums found due.

The terms of the covenant and the circumstances of the case, also the provisions of s. 24, sub-s. 1, of the New Brunswick Judicature Act, 1909, relative to the allowance of interest, appear from the judgment of the Judicial Committee.

At the trial it appeared that the horse power developed and used was measured by meters, and that power in excess of 2000 horse power was first developed on January 10, 1918, when the amount was 2078; later readings in excess of 2000 horse power were as follows: October 30, 1919, 3160; January 6, 1921, 4425; November 15, 1921, 4700; October 30, 1926, 5060. The defendants did not dispute that if, as the plaintiff contended, the payments

were due instantly upon the maximum horse power developed and used exceeding 2000, or that amount plus a multiple 500, the plaintiff was entitled to the $28,000 which she claimed. They contended however that upon the true construction of the covenant the "water power" referred to therein was the average power taken over a year. As the highest average power developed in any year was less than 2000 horse power, they contended that no payments were due.

The trial judge (Byrne J.) upheld the plaintiff's construction of the covenant, and gave judgment for $28,000, rejecting the claim to interest.

Upon an appeal and cross-appeal the Appeal Division, by a judgment delivered by Hazen C.J., affirmed the decision as to the principal sum due, and allowed the plaintiff interest at 5 per cent. upon the sums payable from the date when they became due respectively. The interest was allowed under s. 24, sub-s. 1, of the New Brunswick Judicature Act, 1909, and upon the authority of *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (1)

1929. Feb. 28. *Hon. Geoffrey Lawrence K.C.* and *W. H. Harrison K.C.* for the appellants. Even if upon the true construction (2) of the covenant the respondent was entitled to recover, she was not entitled to interest. At law interest is payable only by agreement, express or implied, or by statute: *Page* v. *Newman.* (3) There was no express agreement nor ground for implying one. The New Brunswick Judicature Act, 1909, s. 24, sub-s. 1, like s. 28 of the English Act (3 & 4 Will. 4, c. 42), sometimes called Lord Tenterden's Act, provides that interest may be allowed upon a sum certain payable under an instrument at a certain time. The Exchequer Chamber held in *Merchant Shipping Co.* v. *Armitage* (4) that a time dependent upon a contingent event was not a time certain within s. 28. In *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (1), which was relied on by the

(1) (1875) L. R. 10 Q. B. 371.
(2) The appellants contended for the construction stated above.
(3) (1829) 9 B. & C. 378.
(4) L. R. 9 Q. B. 99, 114.

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Appeal Division in this case, the Queen's Bench (Blackburn J. dissenting) held to the contrary, but the Court apparently was unaware of the decision of the Exchequer Chamber. In *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) the Court of Appeal followed the decision of the Exchequer Chamber. An appeal to the House of Lords (2) was dismissed on the ground that the sum claimed was a provisional amount, and therefore not a sum certain. Consequently no decision was given between the two views. Lord Herschell however referred to the decision of the Exchequer Chamber as "undoubtedly an authority of very great weight," and Lord Morris expressed his entire concurrence with it. The Supreme Court of Canada in *Sinclair* v. *Preston* (3) followed the Exchequer Chamber in preference to the majority of the Queen's Bench, and that decision was binding in New Brunswick when the Judicature Act, 1909, was passed. The Legislature must be taken to have intended that the words used in s. 24, sub-s. 1, should have the effect assigned to them by the Supreme Court. Nor was interest recoverable in equity. The action was for a debt, and in that case equity follows the law in allowing or not allowing interest: *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (4) The rule under which equity allows interest between a vendor and purchaser from the date of possession does not apply to the circumstances of this case. The money was recoverable under an independent covenant, which could operate only after possession was taken. The contract had been completely performed many years before the sums became due.

F. R. Taylor K.C. for the respondent. The view taken by the Court of Queen's Bench in *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (5) has never been authoritatively disapproved. In *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) the Court of Appeal considered itself bound by the decision of the Exchequer Chamber,

(1) [1892] 1 Ch. 120.
(2) [1893] A. C. 429.
(3) (1901) 31 Can. S. C. R. 408.
(4) [1892] 1 Ch. 120, 142.
(5) (1875) L. R. 10 Q. B. 371.

but Lindley M.R. said that it "adopted a restricted, or perhaps rather it may be called a narrow construction of the section." The House of Lords gave no decision between the two views. The facts in *Sinclair* v. *Preston* (1) materially differed from these in this case, the liability depending upon more than one event outside the ambit of the contract. In any case the respondent was entitled to interest in equity. It is an established rule of equity that a purchaser of land pays interest from the date when he gets the benefit of possession: *Swift & Co.* v. *Board of Trade.* (2) That rule was recently applied by the Board in *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission.* (3) The payments provided for by the covenant were an essential part of the consideration for the conveyance. The appellants had the benefit of the increased power, and the respondent had no means of ascertaining when the payments for it became due.

Hon. Geoffrey Lawrence K.C. in reply referred to *Rose* v. *Watson.* (4)

May 13. The judgment of their Lordships was delivered by

LORD TOMLIN. In this case the defendants in the action are appealing from a judgment of the Appeal Division of the Supreme Court of New Brunswick, dated March 26, 1928. By that judgment the Appeal Division (1.) dismissed an appeal of the defendants from a judgment against them for $28,000 without interest, given by the King's Bench Division of the Supreme Court of New Brunswick on October 20, 1927, and (2.) allowed a cross-appeal of the plaintiff, thereby increasing the amount recoverable against the defendants by $9,083.88 in respect of interest.

Two questions only have been argued on this appeal. First, whether upon the true construction of certain covenants the defendants have become liable for the $28,000 for which judgment has been given against them. Secondly, whether the defendants are chargeable with interest on any sum which they may be held liable to pay under the covenants.

(1) 31 Can. S. C. R. 408.
(2) [1925] A. C. 520, 532.
(3) [1928] A. C. 492.
(4) (1864) 10 H. L. C. 672, 682.

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The facts of the case are as follows :—

Prior to the year 1905, the plaintiff's predecessor in title, Havelock McC. Hart, acquired land, partly in New Brunswick and partly in Maine, on both banks of the Aroostook River in the neighbourhood of the Aroostook Falls, together with certain water privileges, for the purpose of developing the water power of the Falls.

In 1905 Hart and one Arthur R. Gould (the owner of all the capital stock of the Presque Isle Electric Light Company) entered into an agreement with the defendants whereby Hart was to transfer all his land and water privileges on the Aroostook River to the defendants, and Gould was to transfer to the defendants all his capital stock in the Presque Isle Electric Light Company. The consideration to Hart for the transfer by him of the land and water privileges was (1.) the allotment or transfer to him of certain stock of the defendants, and (2.) the defendants' covenants, the true construction of which falls to be determined upon this appeal. The documents relating to the transaction do not contain any reference to the stock to be allotted or transferred to Hart, but it is not disputed that it was part of the bargain that Hart should have the stock, and that the stock was, in fact, allotted, or transferred to him upon the execution of the indentures of conveyance completing the transaction to which reference will be made hereafter.

The first relevant document is a memorandum of agreement, dated January 3, 1905, and made between Hart, Gould and the defendants. It contained a recital that under arrangements, which had been mutually made between them, Gould was to transfer to the defendants all the capital stock of the Presque Isle Electric Light Company, and Hart was to convey or cause to be conveyed to the defendants by deeds in the form thereto annexed as schedules A and B, the lands and water privileges described in the said schedules, being the lands and water privileges already referred to.

The operative part of the agreement provided that upon the defendants completing the necessary financial arrangements

for the development of water power at the Aroostook Falls to the satisfaction of Gould and Hart, Hart should and would convey or cause to be conveyed to the defendants by deeds in the form thereto annexed as schedules A and B, the lands and water privileges described therein, and Gould should and would assign and transfer or cause to be assigned and transferred to the defendants all the capital stock of the Presque Isle Electric Light Company.

The stock of the defendants to be allotted or transferred to Hart was duly allotted or transferred to him.

The conveyance of the lands and water privileges by Hart to the defendants was also in due course effected by means of two indentures of conveyance, dated January 13, 1905, one of which related to the lands and water privileges in New Brunswick and the other to the lands and water privileges in Maine. The two indentures were mutatis mutandis identical in form. Each of them contained a covenant by the defendants with Hart in the following words: "The said The Maine and New Brunswick Electrical Power Company, Limited, doth hereby for itself, its successors and assigns covenant with the said Havelock McC. Hart, his heirs, executors, administrators and assigns that if water power to a greater extent than two thousand horse power be at any time developed and used at the Aroostook Falls, situate upon the hereinabove described lands and premises, the said The Maine and New Brunswick Electrical Power Company, Limited, its successors and assigns shall pay to the said Havelock McC. Hart, his heirs, executors, administrators and assigns the sum of eight dollars for each horse power in excess of the said two thousand horse power, any power developed and used in excess of two thousand horse power to be treated as divided into units of 500 and each unit to be immediately paid for in entirety when any part thereof has been developed and used."

By deed of assignment, dated August 21, 1923, Hart assigned all his rights under the covenants contained in the indentures of conveyance and all moneys payable thereunder to the plaintiff.

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After the completion of the sale and transfer of the lands and water privileges the defendants erected works at or near the Aroostook Falls for the purpose of developing the water power of the Falls, and began and have since continued to generate electrical power therefrom for distribution and sale to customers. The defendants have from time to time increased the capacity of their works.

It appears from the power station sheets of the defendants, in which is entered an hourly record of the amount of power produced, that the defendants for the first time on January 10, 1918, and on several subsequent occasions, developed and used power in excess of 2000 horse. The action out of which this appeal arises was begun by the plaintiff to recover the sums payable under the covenants in respect of such excess horse power.

The plaintiff contends that upon the true construction of the covenants the defendants are liable to pay for excess horse power immediately upon each occasion where any excess horse power is developed and used; in other words, that the defendants are chargeable from time to time upon the maximum peak load once reached. There is no dispute as to the figures, and if the plaintiff's contention is well founded judgment was rightly given against the defendants for $28,000.

The defendants, however, contend that " water power " of a stream means the average power produced over a reasonable period of time, and that in view of the fluctuations of the seasons the most reasonable period of time is a year, and that, therefore, on the true construction of the covenants they ought to be charged upon the average load of the year and not upon the individual maximum peak loads.

Both Courts below have decided this point against the defendants.

In their Lordships' judgment the contention of the defendants cannot be reconciled with the language of the covenants. The words " at any time " and " immediately " contained in the covenants seem to their Lordships to indicate recurring points of time and not any system of averaging.

Further, the similarity between the language under consideration in the present case, and that considered by their Lordships' Board in the case of the *Attorney-General for Ontario* v. *Canadian Niagara Power Co.* (1), is such that a decision in favour of the defendants here would, in their Lordships' view, be inconsistent with the earlier decision of the Board.

Upon the point of construction, therefore, in their Lordships' opinion, the defendants fail.

The question of interest next falls for consideration. On this head of the case the Appeal Division of the Supreme Court, differing from the trial judge, have allowed interest against the defendants.

There is no agreement to pay interest, either in express terms or implicit, in the language of the covenants. The plaintiff, however, contends that interest is payable either under s. 24, sub-s. 1, of the New Brunswick Judicature Act, or under the rule by virtue of which a Court of equity compels a purchaser who takes possession to pay interest. The Appeal Division in deciding in the plaintiff's favour have founded themselves upon s. 24, sub-s. 1, of the New Brunswick Judicature Act.

The language of s. 24, sub-s. 1, of the New Brunswick Judicature Act, 1909, is as follows: "On the trial of any issue or any assessment of damages upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable."

The language of this section cannot be distinguished from that in s. 28 of 3 & 4 Will. 4, c. 42, sometimes called Lord Tenterden's Act. The English decisions on that section are, therefore, relevant for guidance. In their Lordships' judgment the decision of the Exchequer Chamber in *Merchant Shipping Co.* v. *Armitage* (2) is an authority binding the English Courts up to and including the Court of Appeal to hold under Lord Tenterden's Act that if the sum becomes payable at a time fixed by reference to a contingent event

(1) [1912] A. C. 852. (2) L. R. 9 Q. B. 99, 114.

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which may or may not happen, it is not payable by the written instrument at a time certain. This decision was treated as authoritative by the Court of Appeal in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1), and was viewed with benevolence by Lord Herschell in the House of Lords: see *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2)

It is further to be observed that in *Juggomohun Ghose* v. *Manickchund* (3) their Lordships' Board held under an Indian statute (Act No. XXXII. of 1839) identical in terms with the relevant section of Lord Tenterden's Act, that a sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed.

In view of the last mentioned decision, which is binding on their Lordships' Board, it would not, in their Lordships' judgment, be open to them to hold that the effect of s. 24, sub-s. 1, of the New Brunswick Judicature Act is different from that of the section of the Indian Statute under consideration in *Juggomohun Ghose* v. *Manickchund.* (3) The defendants' contention that s. 24, sub-s. 1, of the New Brunswick Judicature Act has no application to the present case must, therefore, prevail.

It remains to consider whether any rule of equity entitles the plaintiff to interest.

In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.

It must, however, be borne in mind that when once such a contract has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains

(1) [1892] 1 Ch. 120. (2) [1893] A. C. 429, 435.
(3) 7 Moo. I. A. 263.

nothing to attract the equitable jurisdiction, and the parties are left to their remedies at law.

In the case under consideration the contract for the sale of the lands and water privileges has been fully executed. Hart conveyed the property purchased to the defendants. He received from the defendants the stock to be transferred to him, and he accepted from the defendants, as under the contract he was bound to do, covenants under seal to perform certain obligations of a continuing character involving the payment from time to time of sums of money. Upon the stock having been allotted or transferred to Hart and the covenants having been executed, Hart had received all the consideration moving from the defendants to him under the contract. The plaintiff, as Hart's successor in title, cannot, and, as appears from her statement of claim, does not sue upon the contract, which is fully executed: she sues upon the covenants. Those covenants must be construed according to the ordinary rules of construction; and if, so construed, they do not give the plaintiff interest, she cannot claim interest unless it is given to her at common law or under statute. There is no place in the matter for the exercise of equitable jurisdiction, and, therefore, no rule of equity in regard to interest can have any application.

In their Lordships' judgment the plaintiff's cross-appeal for interest to the Appeal Division of the Supreme Court of New Brunswick ought to have failed and to have been dismissed with costs.

In the result, therefore, the defendants succeed on the present appeal to the extent of the judgment against them for interest, but otherwise the appeal fails, and their Lordships will humbly advise His Majesty accordingly. There will be no costs of this appeal.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Lawrence Jones & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1929 July 11.

TANNOCH (PAUPER) . . . . . APPELLANT;

AND

BROWNIESIDE COAL COMPANY, LIMITED . . . . . } RESPONDENTS.

Workmen's Compensation—Partial or total Incapacity—Physical Recovery—Disfigurement—Failure to obtain Employment as "a consequence wholly or mainly of the injury"—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 4.

The Workmen's Compensation Act, 1925, enacts, by s. 9, sub-s. 4: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves . . . . that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity . . . .":—

The words "employment of a certain kind" include the workman's employment at the time of the injury.

Dictum of Viscount Dunedin in *Bevan* v. *Nixon's Navigation Co.* [1929] A. C. 44, 53 reconsidered and withdrawn.

A miner lost the sight of his right eye through an accident arising out of and in the course of his employment, and the blindness of that eye was obvious. He subsequently became physically able to resume his former employment and to earn his former wage. He took all reasonable steps to obtain work as a miner or in any other suitable employment, but without success. The obvious blindness of his right eye adversely affected his chances of obtaining suitable employment, and his failure to obtain such employment was mainly a consequence of that injury. In an application by him for compensation, the arbitrator found that he was partially incapacitated in the sense that he was handicapped in the effort to obtain work and ordered that his incapacity should, for the purposes of the Act, be treated as total incapacity, and he awarded him compensation on that footing.

Held, that the claimant had "so far recovered from his injury as to be fit for employment of a certain kind" within the meaning of the sub-section, but that he had not completely recovered by reason of his disfigurement, and that the arbitrator was entitled to award him compensation on the basis of total incapacity.

Decision of the First Division of the Court of Session in Scotland 1929 S. C. 99 reversed.

* *Present*: LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (the Lord President, Lord Sands, and Lord Morison) (1) reversing a determination of the Sheriff-Substitute of Lanarkshire as arbitrator under the Workmen's Compensation Act, 1925.

The facts are fully stated in the opinion of Lord Warrington of Clyffe and are summarized in the headnote.

1929. May 3. *J. C. Watson K.C.* (with him *James A. R. MacKinnon*) (both of the Scottish Bar) for the appellant. The First Division adopted an erroneous construction of s. 9, sub-s. 4, of the Act of 1925 in confining its application to cases in which the range of employment for which the workman was physically capable was still restricted as compared with his capacity prior to the accident. Disfigurement being a physical effect of an injury by accident entitles a workman to an award as for total or partial incapacity, although it does not prevent him from doing work if he could get it, provided the disfigurement prevents him from getting the work which he could do or handicaps him in obtaining it. The arbitrator, apart from s. 9, sub-s. 4, could have made an award as for total incapacity on the principle of *Ball* v. *William Hunt & Sons* (2) on the ground that the appellant was not earning or able to earn anything at the date of the award, but, further, his decision falls exactly within the terms of the sub-section.

MacRobert L.A. (with him *James R. Marshall* (of the Scottish Bar)) for the respondents. The arbitrator has found that physically the appellant has completely recovered from his injury, but that he is suffering from disfigurement. In these circumstances the appellant cannot bring himself within sub-s. 4, first, because it refers only to a person who has partially recovered in a physical sense, and, secondly, because it is limited to a case where the result of the injury is that the workman is restricted in the sphere of his employment. The arbitrator was not entitled either under the sub-section or on the principle of *Ball* v. *William Hunt & Sons Ld.* (2)

(1) 1929 S. C. 99. (2) [1912] A. C. 496.

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to award compensation upon the basis of total incapacity to a man who is specifically found by him to have completely recovered his ability to do his former work and whose disfigurement only partially incapacitates him from obtaining suitable employment. The case should go back to the arbitrator to say how far the appellant's inability to obtain suitable employment is due to his incapacity and how far it is due to the conditions of the labour market: *Middleton* v. *Wharncliffe Woodmoor Colliery Co.* (1)

J. C. Watson K.C. added nothing in reply.

The House took time for consideration.

1929. July 11. LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal by a workman entitled to compensation under the Workmen's Compensation Acts from an interlocutor of the First Division of the Court of Session reversing a decision of the arbitrator who had held that the workman's case came within s. 9, sub-s. 4, of the Act of 1925 and had in pursuance of that section ordered that his incapacity should for the purpose of the Act continue to be treated as total incapacity until the further order of the Court and therefore awarded compensation at the rate of 30*s.* weekly as from December 9, 1927, until such further order.

The question submitted to the Court of Session was whether under the circumstances he was entitled to award compensation on the basis of total incapacity.

The real question is whether on the true construction of the section the workman's employment before the injury is or is not included in the expression "employment of a certain kind."

The material facts as found by the arbitrator are as follows:—

The appellant on March 2, 1927, sustained an injury by accident arising out of and in the course of his employment, as the result of which he has completely and permanently lost the sight of his right eye. The blindness of his right eye is obvious to any one looking at him.

(1) (1922) 15 B. W. C. C. 166.

The claimant has since December 9, 1927, been physically able to resume his work as a miner and to earn his former wage. Such work is suitable to him in his present condition, and he is willing to do such work if he can get it, but the obvious blindness of his right eye adversely affects his chances of obtaining work either as a miner or in any other employment for which he is suited.

The arbitrator further finds that he has taken all reasonable steps to obtain and has failed to obtain employment as a miner or as a quarryman, and has also endeavoured through the Labour Exchange to obtain other employment but without result, and that his failure to obtain employment for which he is suitable is mainly a consequence of the injury.

Therefore the facts which by the section he is required to prove have been proved to the satisfaction of the arbitrator and the section would apply if the workman is, within the meaning of its opening words, one "who has so far recovered from his injuries as to be fit for employment of a certain kind."

The words "so far recovered" do seem to indicate that the Legislature was contemplating some condition short of complete recovery. But assuming this to be so, the appellant has not completely recovered. So far as his nervous and muscular activities, and his general physical condition are concerned he is not affected by the results of his injuries, but he is and always will be deprived of the sight of one eye, and this deprivation is obvious and affects his chances of obtaining work.

This being so the only question is whether his former employment is excluded by the words "employment of a certain kind." With all respect to the opinions of their Lordships of the Court of Session I can find no sound principle of construction in accordance with which those words can properly be so limited.

It may be that the Legislature had in view some employment less arduous than or different from that for which the man was previously fit, and had not realized the possible consequences of a wider construction, but a Court of Justice

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has to construe and give effect to the words of the statute, and if these words go further than the Legislature intended it is for that body to correct them.

For the above reasons I agree that this appeal should be allowed and the award of the arbitrator restored.

The respondents should be ordered to pay the appellant's costs here and in the Court below.

My noble and learned friend Lord Buckmaster concurs in the opinion which I have just read.

VISCOUNT DUNEDIN. My Lords, I cannot help feeling, though my opinion in the recent case of *Bevan* v. *Nixon's Navigation Co.* (1) was not quoted, that I may be partially to blame for the view taken by the First Division, for in that case dealing with s. 16 of the Act of 1923, which is repeated totidem verbis in sub-s. 4 of s. 9 of the Act of 1925, I said that that section deals with fitness for employment of a certain kind, i.e. not his original employment. I do not, on reflection, think it was unnatural to say so, for I feel sure that that section was put in solely to modify the result of the judgment in *Cardiff Corporation* v. *Hall* (2), and what was in the mind of the Legislature was the recovery of the man so as to be able to do some other work than that from which he had been deterred by the accident.

But on reflection I have come to the conviction that the true view is that stated by Lord Warrington in the opinion which I have had the advantage of reading. That was the mind of the Legislature, but words have been used which are wide enough to cover work even of the old kind, and it is not for a Court to restrict those words. I must admit that my words in that case are too absolute. This admission does not in any way affect the judgment in the case; as far as that case is concerned, I come to the same conclusion, although my view as to what is meant by kind of work is altered.

As regards the question of recovery, I do not feel any doubt. The workman has recovered but he is not wholly

(1) [1929] A. C. 44, 53. (2) [1911] 1 K. B. 1009.

recovered, for he is still an incomplete man owing to the accident.

I concur in the motion proposed.

LORD ATKIN (read by LORD THANKERTON). My Lords, it is unnecessary to recapitulate the facts of this case. I propose to deal at once with the construction of s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, in which the learned Sheriff-Substitute has somewhat unnecessarily, as it seems to me, involved himself and the Court. The view that has found favour with the Court is that "Employment of a certain kind" necessarily means employment of a narrower range than that for which the workman was fit before the accident. For instance if he was fit for heavy work before the accident, and is recovered so as to be fit only for light work now he brings himself within the section if he satisfies the judge as provided therein. I have no doubt that the section includes such a case. But I see no reason for confining the section to a restricted range of employment. It seems strange that if a workman has recovered so as to be fit for some work and cannot get it owing mainly to his injury, he can be compensated, but that if he has recovered so as to be fit for any work and cannot get it owing to his injury he cannot be compensated. I can see no dividing line between all or some either in logic or in practice: nor can I see that the position is bettered by reading "a certain kind" as "any work except his original employment." I approach the section differently. When a workman has been incapacitated by an accident and the question is whether he can earn wages at any employment, the section seems to provide that he may meet the suggestion of suitable employment or employments by proving that he has tried to obtain that or those employments and has failed to obtain them owing wholly or mainly to the injury. The employment for which he is fit may be one or many, but if he proves the statutory conditions he is still totally incapacitated. This seems to me to apply though the employment suggested is his original employment. If he cannot obtain it because

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of the injury, it is worth nothing to him; and it is just the same as any other employment to which the section applies. What seems to be contemplated is the case of a man injured, recovered so as to be fit for work, but not fully recovered, i.e., still left with a disability due to the accident which is reasonably capable of affecting his opportunity of being employed. Lameness is only an instance: disfigurement, as in the present case, is obviously another instance. The employer is protected by the judge having to be satisfied that there are consequences of the injury still operating to cause the workman wholly or mainly to fail to obtain employment.

For myself I doubt whether the section makes any material alteration in the law. Apart from the section altogether, if the injury mainly prevents a man from obtaining work in any particular employment, I imagine that it cannot be taken into account in assessing compensation that other causes are also operating in that particular employment such as a slack demand for labour. If the effect of the injury is that it operates to prevent him from getting employment in many but not from getting employment in some occupations, it may be said that failure to get any employment is mainly the consequence of the injury; but that is not in this connection the meaning of the word: nor in such circumstances would the workman benefit with or without the sub-section. As Lord Loreburn says in *Ball* v. *William Hunt & Sons Ld.*(1): "In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch." It seems to me that on principle this applies where there are several causes making the workman's labour unsaleable in any given employment, but the main cause is a physical defect due to an accident arising out of and in the course of his employment.

(1) [1912] A. C. 496, 499.

It would appear therefore that the learned Sheriff-Substitute could have decided this case in favour of total incapacity, on the principles of *Ball* v. *William Hunt & Sons Ld.*(1), and the last sentence of his note seems to indicate that such was his own view. His formal finding however records a partial incapacity, and it is upon that footing that this case must be decided. In my opinion the construction put upon s. 9, sub-s. 4, by the learned Sheriff-Substitute was correct, and this appeal should be allowed with costs and the original award restored.

LORD THANKERTON. My Lords, the appellant, while employed by the respondents as a miner, sustained injuries in March, 1927, as the result of which he has completely and permanently lost the sight of his right eye.

The facts, as found by the learned arbitrator, establish (*a*) that since December, 1927, the appellant has been physically able to resume his former employment and earn his former wage, and that the appellant has tried, without success, to obtain employment as a miner or quarryman or other employment, and (*b*) that the obvious blindness of the appellant's right eye adversely affects his chances of obtaining work either as a miner, or in any other employment for which he is suited, and that his failure to obtain such employment is mainly a consequence of that injury.

In these circumstances, the arbitrator, in terms of s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, ordered that the appellant's incapacity should, for the purposes of the Workmen's Compensation Acts, continue to be treated as total incapacity until the further order of the Court, and awarded compensation at the rate of 30*s.* weekly.

On appeal by stated case, the Court of Session held that the arbitrator was not entitled to award compensation on the basis of total incapacity, and the present appeal is taken against that decision.

The only question at issue is whether the present case comes within the words "Has so far recovered from the injury as to be fit for employment of a certain kind."

(1) [1912] A. C. 496, 499.

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The respondents maintained, in conformity with the opinions of their Lordships of the Court of Session (*a*) that these words applied only to cases of partial physical recovery, and not to a case of complete physical recovery such as the present, and (*b*) that they were limited to cases where the range of suitable employment is restricted, and did not apply to a case, such as the present one, where the workman is physically able to perform his former work.

As regards the first contention, the words "has so far recovered from the injury as to be fit for employment" appear to me to do no more than indicate the arrival at a stage of recovery from the injury, and to place no limit on the new stage short of complete recovery from the injury. The appellant remains permanently injured.

A more difficult question is involved in the second contention—namely, whether "employment of a certain kind" excludes the workman's original employment. The expression is somewhat indefinite, but I am unable to read it as meaning "employment of a kind other than his employment at the time of the accident"; nor am I able to read it as meaning "employment for some kinds of work but not for all kinds," as such a distinction appears to me to be impracticable and meaningless. Here again I am of opinion that the sub-section postulates the arrival at a certain stage of recovery from the injury and places no posterior limit short of complete recovery from the injury, provided the other conditions of the sub-section are complied with, as they admittedly have been in the present case.

Accordingly, I agree that the appeal should be allowed and the award of the arbitrator restored.

Interlocutor of the First Division of the Court of Session in Scotland reversed and determination of the Sheriff-Substitute of Lanarkshire restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action

in the Court of Session and also the costs of the appeal, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, July 11, 1929.

Solicitors for the appellant: *H. M. Meyler & Co., for R. Maguire, Cook & Co., Glasgow, and Allan M'Dougall & Co., Edinburgh.*

Solicitors for the respondents: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W. S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1929 *July*—18.

WILSONS AND CLYDE COAL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

BURROWS . . . . . RESPONDENT.

Workmen's Compensation—Reference of Dispute as to Workman's Condition to Medical Referee—Certificate of Medical Referee that Workman had completely recovered—Finality—Averment by Workman based on later Medical Examination that Recurrence of Incapacity was reasonably probable—Inquiry into Averment—Competency—Workmen's Compensation Act, 1925 (15 *& 16 Geo. 5, c. 84*), *s.* 19.

A medical referee, to whom a dispute as to the condition of a workman who had sustained injuries by accident arising out of and in the course of his employment had been referred under s. 19 of the Workmen's Compensation Act, 1925, after giving two certificates of partial recovery, certified that in his opinion the workman had completely recovered from the accident and was fit for his ordinary work:—

Held, that the medical referee must be taken to have directed his mind, not merely to the condition of the workman at the moment, but to the possibility of a recurrence of incapacity, and that his certificate was final and conclusive.

Where therefore, upon an application by the employer to end the compensation, the workman lodged a minute informing the Court that

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* *Present*: VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD CARSON, LORD BLANESBURGH, and LORD THANKERTON.

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skiagrams taken since the last certificate of the medical referee had disclosed conditions not apparent on external examination, and that there was a reasonable probability of a recurrence of incapacity :—

Held, that it was not competent to the arbitrator, or, failing him, to the appellate Court, to direct an inquiry into the facts set forth in the minute, and that the only course open to the arbitrator was to end the compensation.

Decision of the Second Division of the Court of Session in Scotland 1929 S. C. 409 reversed.

APPEAL from an order of the Second Division of the Court of Session in Scotland (1) upon a case stated by the Sheriff-Substitute of Lanarkshire as arbitrator under the Workmen's Compensation Act, 1925.

The facts are fully set forth in the opinion of Viscount Dunedin, but the following summary may be useful :—

The respondent sustained injuries to his back as the result of an accident arising out of and in the course of his employment with the appellants. After two certificates from a medical referee, which resulted in the respondent being paid compensation on the footing of partial incapacity, the same referee certified that the appellant had completely recovered and was fit for his ordinary work. The appellants thereupon filed a request for arbitration for the purpose of ending the compensation. In the course of the debate before the arbitrator the respondent lodged a minute informing the Court that skiagrams taken at the Royal Infirmary, Glasgow, since the last certificate of the medical referee disclosed conditions not apparent on external examination, and that there was a reasonable probability of a recurrence of incapacity. The respondent did not ask leave to lead evidence in support of these averments, but moved for an order for a suspensory award, or, alternatively, for a remit to the medical referee for further report.

The arbitrator refused both these motions, and the questions of law for the Court were (1.) whether the arbitrator was entitled to refuse to remit the case back to the medical referee ; and (2.) whether he was entitled to end the compensation.

(1) 1929 S. C. 409.

The Second Division (the Lord Justice-Clerk, Lord Ormidale, Lord Hunter and Lord Anderson) answered the first question in the affirmative. As to the second question, they took the view that the respondent, on the refusal of his application for a remit to the medical referee, ought to have asked for a proof of the averments in the minute, and, in the result, they remitted to the arbitrator to inquire into the facts set forth in the minute. It was against this part of the interlocutor that the appellants appealed.

T. M. Cooper K.C. (of the Scottish Bar) (with him *Donald Geddes* (of the English Bar)) for the appellants. By s. 19, sub-s. 3, of the Workmen's Compensation Act, 1925, the medical referee is required to certify (inter alia) "as to the condition of the workman" and his certificate is declared to be final and conclusive. In this case the medical referee, who had examined the workman on two previous occasions, finally certified that he had "completely recovered from the accident" and that he was "fit for his ordinary work." This certificate was unambiguous, and was tantamount to a finding that the workman's condition was the same as it would have been if the accident had never occurred. The certificate negatived by necessary implication the idea that the workman's condition was still such that a recurrence of incapacity due to the accident was "reasonably probable" and it was only if such a recurrence was "reasonably probable" that a suspensory award could competently be made: *Hargreave* v. *Haughhead Coal Co.* (1); *King* v. *Port of London Authority.* (2) In face of such a certificate the only competent course was to end the compensation, and neither the arbitrator nor the appellate Court could competently order an inquiry into the allegation that the workman was liable to a recurrence of incapacity without impugning the accuracy of the medical referee's certificate and defying the direction of the statute that the certificate should be conclusive as to the matters therein certified. This case is a fortiori of *Richard Evans & Co.* v. *Gilbie.* (3) If the decision of the Second Division

(1) [1912] A. C. 319. (2) [1920] A. C. 1.
(3) (1926) 19 B. W. C. C. 375, 382–3.

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were well founded it would in many cases be futile to resort to the expeditious and inexpensive expedient of a remit to a medical referee.

Fenton K.C. (with him *G. R. Thomson*) (both of the Scottish Bar) for the respondent. The certificate of the medical referee is final only as regards matters therein certified. A certificate of complete recovery does not necessarily negative the probability of a recurrence of the incapacity and the respondent is not thereby excluded from an inquiry into that question: *Prendergast* v. *Lancaster's Steam Coal Collieries*. (1) That the Second Division had jurisdiction to remit to the arbitrator with a direction to inquire into the averments of the minute lodged by the respondent is shown by *Park* v. *Coltness Iron Co.* (2)

VISCOUNT DUNEDIN. My Lords, in this case the respondent was employed by the appellants as a contractor and a working miner in their Parkhead Colliery, Bellshill, and on August 27, 1924, he received injuries to his back by accident arising out of and in the course of his employment. The appellants admitted liability and paid him compensation at the full rate as for total incapacity up to October 20, 1924, when he returned to the colliery and was paid wages and went on working, being paid wages until the miners' strike came. In December, 1926, the respondent commenced arbitration proceedings, in which he claimed compensation from the appellants as from the date on which he had ceased working at the colliery. The arbitrator awarded him compensation at the rate of 1*l.* per week in respect of partial incapacity, and compensation was paid weekly in terms of that award. In October, 1927, the question of the applicant's condition and his fitness for employment was referred to a medical referee, and in November, 1927, the medical referee gave a certificate, which I need not read, but the result of which was that the compensation was not stopped. On February 28, 1928, he was again examined, and again there is a long statement, in which the medical referee says that he does not think the

(1) (1925) 18 B. W. C. C. 494. (2) 1913 S. C. 1163, 1165.

complainant is nearly as bad as he says he is, but again compensation is not stopped. Finally, on September 29, 1928, the matter was again referred to the same medical referee who, of course, had complete cognizance of the case. The minute on which it was referred was a minute of the appellants who averred that the complainant had become fit for his ordinary work on September 21, 1928, the contention on the other side being that he was only fit for light work, which, of course, meant that he was entitled to partial compensation. On that reference the medical referee issued his decision on October 18, 1928, in the following terms: "I have on the 18th day of October 1928 re-examined the said Aldred Burrows (last certificate 29/2/28) and I hereby certify as follows:—The said Aldred Burrows is in fair general condition. Says still has pain in back, and that it is worse than when here in February, so that he is hardly able to move about. No rigidity of lumbar muscles, winces a little when left loin is touched; also when lower sacrum touched. There are no physical signs in support of complaints of pain, and admits that morning stiffness tends to pass off as day advances. He has in my opinion completely recovered from the accident, and his condition is such that he is fit for his ordinary work, and has been so as from 21st September 1928." On that certificate the appellants made an application to the arbitrator to end the right to compensation as at September 21, 1928. Before the actual decision was given the workman's agent lodged a minute in the following terms: "The minuter respectfully refers to the medical referee's reports of 11th November, 1927, 29th February and 18th October, both 1928, and informs the Court that skiagrams taken at the Royal Infirmary, Glasgow, since 28th October 1928 and in their possession, disclose that the following conditions not apparent on external examination are present, namely, a compression fracture of the 4th lumbar vertebra and fractures of both of the transverse processes of the 3rd lumbar vertebra on the right side, bits of new bone forming in the inter-vertebral spaces and progressive changes to the body of the 5th lumbar vertebra, and that there is a reasonable

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probability of a recurrence of incapacity. He moves the Court to restrict the award to follow on respondent's minute No. —— of Process to a suspension of his right to compensation, or alternatively, to re-remit the matter to the medical referee for further report." On that minute the Sheriff-Substitute, the arbitrator, was asked to remit the case back to the medical referee for further report. This he refused to do; and the arbitrator goes on to say in the stated Case: "After hearing parties I issued an order ending the claimant's right to compensation as at 21st September, 1928." The questions of law for the opinion of the Court are: "(1.) Was I entitled to refuse to remit the case back to the medical referee for further report? and (2.) Was I entitled to end the appellant's right to compensation as at 21st September 1928?"

When the case came before the Second Division the Second Division answered the first question in the affirmative, that is to say, they thought the arbitrator was within his rights in saying: "I will not remit to the medical referee," but with regard to the second question they took up the averments in the minute and they then said: "It would have been for the claimant, when he found that his motion to re-remit the matter to the medical referee was refused, to ask for a proof of his averments in the minute," and the learned Lord Justice-Clerk went on to say: "In my opinion that motion would have been granted," and then he proceeded to discuss the question whether, as that motion had not been actually made, it might not be made before the Division as they then stood, and he held that it might. The result was that the learned judges did not actually negative the second question, but they practically said that the Sheriff-Substitute in the circumstances of the case was not entitled to end then and there the compensation, because he ought to inquire into the circumstances disclosed in the minute, and they remitted the case to him in order that he might inquire into the circumstances as averred in the minute.

My Lords, I have no hesitation in saying that this is a departure from procedure quite unprecedented and of a most grave character as tending really to interfere with the proper

carrying out of the Workmen's Compensation Act. The Workmen's Compensation Act provided for an inquiry, where matters were not agreed, before an arbitrator, and that arbitrator had primarily, of course, to inquire whether there was an accident and, if there was an accident, whether injury had occurred by that accident and whether the accident had occurred in the course of and out of the employment of the claimant. But the statute also dealt with the question of recovery from an accident. That recovery might take place at once before any compensation had been awarded or it might take place after compensation, either complete or partial, had been paid, and the statute clearly showed that it was thought that that sort of question had better be determined in another way than by a mere proof before the arbitrator, where you would have conflicting opinions on the one side and the other. Accordingly s. 17 of the Act of 1925, which is now in force, says: "Where a workman has given notice of an accident, or where an accident has occurred in respect of which the necessity of giving notice under this Act is dispensed with, he shall, if so required by the employer submit himself for examination," and then s. 18 says: "Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination." So in both those cases, if the employer desires, the workman is to submit himself for examination. When we come to s. 19 there is, first of all, a provision that the examination is only to be in accordance with rules and regulations made by the Secretary of State, and as regards intervals, so that he should not be told to come up for examination every second day. Then comes the second sub-section, which says there must be a report on that, and the employer can have him examined and, if they do not agree, where an application is made to the registrar by both parties, or, subject to appeal to the judge, by one of the parties, the arbitrator may refer the matter to a medical referee; and there is this proviso: "Where the application is made by only one of the parties, the registrar, or on appeal the judge, if he is of opinion that,

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owing to the exceptional difficulty of the case or for any other sufficient reason, the matter ought to be settled in default of agreement by arbitration, shall refuse to allow the reference." But if he does not do that the reference goes on, and then comes sub-s. 3: "The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified." It is quite clear that under the word "condition" it would be a perfectly relevant inquiry, not only whether the man was fit for employment at the moment—which really comes under the succeeding words—but whether the injury was of such a character that there was, owing to the injury, some more or less latent disability at the time but which at any time might break out, and which, therefore, would give a reasonable probability of unfitness for employment supervening. That would be a perfectly relevant inquiry before the medical referee, and I have no doubt that if there is anything in the case of that sort it is the workman's duty to submit it to the medical referee, but when the medical referee has given his certificate that certificate is to be final. I search in vain for any idea in the statute that, notwithstanding the certificate of the medical referee, it is still within the power of the arbitrator, or, if he does not do so, in the power of the Court on appeal, to order a general inquiry into the matter. That idea, I think, would simply upset the whole scheme of the Act as to the medical referees. I have no doubt whatsoever that on the report of the medical referee it is perfectly competent for the arbitrator to say: "Your report is ambiguous and I send it back to you in order that you may explain clearly what you mean"; but if the report is not ambiguous, then it is for the arbitrator to take that report and to take it as final.

In the present case the report is not ambiguous. It says that he has completely recovered, and although actually in

the two questions the point does not come forward, it is quite clear from a note which the arbitrator appended to his interlocutor that this question was before his mind, because he says at the end of this note: "The contention that the right to compensation should be suspended and not ended appeared to me to raise a fair question for consideration. The matter is one of discretion, and after careful consideration of the history of the case I came to the conclusion that in justice to the employers the right to compensation ought to be ended." I do not think the word "discretion" is very well chosen, but I think what he meant is perfectly clear: "I was quite entitled to consider whether this report as given was a report which really is one of complete recovery or was a report which might include a present condition which, although not militating against present employment yet had in it obvious dangers for the future, and, looking at the whole history of the case and these three inquiries which there had been, I came to the conclusion it was a case where there was complete recovery and I so decided." I have no doubt that if the report of a medical referee showed that there was, in spite of a perfect ability to work at the moment, yet some lesion which would probably break out in the future as the result of the accident and incapacity for work, it would then be perfectly possible to make a suspensory award, and I think the case cited in the House of Lords is a complete authority for that, but that is a perfectly different thing from saying that you are entitled to inquire into that matter in the teeth of the report of the medical referee.

I am therefore of opinion that this appeal ought to be allowed and that the House should declare that the arbitrator here was quite right in ending the compensation. I move your Lordships accordingly.

VISCOUNT SUMNER. My Lords, I agree. I think the language of Dr. Edington's certificate of October 18, 1928, fairly construed, is a statement that the applicant had so completely recovered from the accident that he was as though

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he had met with no accident. It is a statement not merely with regard to the future, but to his diagnosis of the applicant's then condition. It falls within his competence and it is one of those matters to which he must have directed his mind. He had before him previous examinations of the applicant of various kinds and an intimate knowledge of the case, and I think it would be part of his duty, in fairness to the applicant as well as to the employers, to consider the question whether there were any signs of any of those well known liabilities to attract other diseases or further exhibitions of the same disease as an ulterior consequence of the accident, which are noticed from time to time. Unless it were shown that he had disregarded that duty, we should assume that he directed his mind to that matter, among others, and so arrived at his conclusion. It seems to me not only that he had the materials before him upon which he could express his opinion as to the reasonable probability of a recurrence of incapacity, but that his certificate would have spoken of any such reasonable probability, had it existed at its date, as well as of the past symptoms with which he had been familiar. With great respect to the decision of the Lord Justice-Clerk, his certificate had concern with the future and with the reasonable probability of an appearance of some further consequences of the accident, just as much as it had to do with the symptoms from which the man had been suffering, and I take it, therefore, that, having both these matters before him, his mind was directed to them and he expressed the conclusion in the statement that there was a complete recovery.

Lord Carson. My Lords, I concur.

Lord Blanesburgh. My Lords, I agree.

Lord Thankerton. My Lords, the questions on which the medical referee is asked to report are, first of all, as to the condition of the workman and, secondly, as to his fitness for employment. Now it does seem to me that the expression "condition of the workman" must include, among

other things, the stage of recovery from the injuries which were the result of the accident, and it seems to me that he must necessarily consider, in arriving at what his stage of recovery is, the risks which the then condition disclosed as to the future. If there are probable risks as to the future, then there is still a lack of complete recovery in that workman. When we turn to the terms of the medical certificate here, the expression is that in the referee's opinion the applicant has "completely recovered from the accident," and I agree with the opinions which have already been expressed by your Lordships as to the full meaning, effect, and consequence of that certificate.

Interlocutor of the Second Division of the Court of Session in Scotland, in part complained of in the appeal, reversed, and cause remitted back to the Court of Session in Scotland with a direction to answer both the questions of law in the stated Case in the affirmative, and to do therein as shall be just and consistent with this judgment. The respondent to pay the costs of the action in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 18, 1929.

Solicitors for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. B. Rankin & Nimmo, W.S., Edinburgh.*

Solicitors for the respondent: *Kenneth Brown, Baker, Baker, for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

[PRIVY COUNCIL.]

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ROBERT HALL AND ANOTHER . . . APPELLANTS;

AND

PELMADULLA VALLEY TEA AND RUBBER COMPANY, LIMITED . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Registration of Instruments—Immovable Property purchased with Knowledge of an existing Contract—Existing Contract incapable of Registration—Fraud or Collusion—Device to gain Priority—Land Registration Ordinance (No. 14 of 1891), s. 17—Trusts Ordinance (No. 9 of 1917), s. 93.

By s. 93 of the Trusts Ordinance, 1917, of Ceylon: "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition":—

Held (1.)—against the Supreme Court of Ceylon—that the above proviso applies even though the existing contract is not capable of registration as containing no sufficiently definite description of the property affected; but (2.) that in the present case the evidence showed that the later transaction was not a real sale, but a mere device for the purpose of gaining priority by registration, and that this constituted "fraud or collusion" within s. 17 of the Land Registration Ordinance, 1891, so as to defeat the priority which otherwise would have been obtained under the section.

Judgment of the Supreme Court affirmed on a different ground.

APPEAL (No. 7 of 1928) from two decrees of the Supreme Court of Ceylon (March 8, 1927) affirming a decree of the District Court of Ratnapura (August 22, 1925).

The suit was brought by the first appellant, Hall, to recover from the respondent company certain land in Ceylon which the second appellant, Thornhill, had conveyed to Hall by a registered conveyance dated October 25, 1923. The respondent company by its answer relied upon an unregistered agreement, dated September 27, 1910, between Thornhill and the company as a contract by Thornhill to convey the land to the company. Thornhill was joined as a defendant.

* *Present:* LORD BLANESBURGH, VISCOUNT DUNEDIN, and LORD WARRINGTON OF CLYFFE.

The appeal raised questions under the Trusts Ordinance, 1917, s. 93, and the Land Registration Ordinance, 1891, s. 17, both of Ceylon.

The District Court dismissed the suit, and held under s. 93 that the property was held by Hall for the benefit of the respondents. Appeals to the Supreme Court by both the present appellants were dismissed, save for an immaterial variation in the terms of the order.

The material facts, the terms of the above statutory provisions, and the ground of the decision of the Supreme Court appear from the judgment of the Judicial Committee.

1929. June 11. *du Parcq K.C.* and *H. I. P. Hallett* for the appellants. The proviso to s. 93 of the Trust Ordinance, 1917, is in clear terms, and prevents that section from being applicable, since the earlier agreement with the respondent company was not registered in accordance with the Land Registration Ordinance, 1891. The inability of Thornhill to convey, owing to the later conveyance, was an answer to the respondents' claim to specific performance: Fry on Specific Performance, para. 990. Knowledge of the earlier contract, and an intention to gain priority by registration, do not amount to "fraud or collusion" within the proviso to s. 17 of the Ordinance of 1891: *Wikramanayake* v. *Abeywardene*. (1) That view is in accordance with Roman Dutch law as enforced in Ceylon: *Fernando* v. *Peris* (2); and corresponds with the law in England under the Yorkshire Registry Acts.

De Gruyther K.C. and *Parikh* for the respondents. The Supreme Court rightly held that the proviso to s. 93 of the Ordinance of 1917 did not apply, as the contract of 1910 was not registerable. The object of the proviso was to ensure that the law of registration, where applicable, should be complied with. But in any case the suit was properly dismissed. The evidence shows that the later transaction was a mere device to defraud the respondents of priority,

(1) (1914) 17 Ceylon N. L. R. 169, 172.

(2) (1916) 19 Ceylon N. L. R. 281, 283.

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and that no absolute transfer to Hall was intended. That being the case the later instrument was obtained by "fraud or collusion" within the meaning of s. 17 of the Ordinance of 1891, and no priority was obtained by its registration.

du Parcq K.C. replied.

June 27. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. The question in this appeal is whether the first appellant (the plaintiff in the action), as purchaser from the second appellant, is entitled to recover from the respondent company possession of certain lands the subject of his purchase, notwithstanding a previous agreement on the part of the second appellant to sell the same lands to the respondents; or whether, on the contrary, the respondents are entitled to specific performance of the previous agreement.

The action came on for trial before the District Judge of Ratnapura, and by the decree dated August 22, 1925, the plaintiffs' action was dismissed, and an order was made in effect for the specific performance of the agreement, certain inquiries and accounts being directed for the purpose of carrying such order into effect.

The present appellants appealed from this decree to the Supreme Court of Ceylon, and by their order dated March 8, 1927, it was adjudged that the decree of the District Court should be modified in certain respects not material to this appeal, and that, subject to such modifications, the decree of the District Court should be affirmed and the appeal dismissed with costs. Leave to appeal having been obtained from the Supreme Court the present appeal to His Majesty in Council was in due course presented by the two appellants.

The facts material to the present appeal may be shortly stated.

The respondent company was incorporated in the year 1909 for the purpose, amongst other things, of purchasing from the appellant Thornhill an estate called Rilhena, which purchase was subsequently carried into effect. Thornhill, at the same time, undertook to transfer to the company

1000 acres of adjoining land, of which he was not then possessed.

For the purpose of giving effect to this undertaking he entered into a contract in writing with the respondents dated September 27, 1910, and conveniently referred to in the proceedings as agreement No. 693. By this agreement Thornhill agreed to sell and convey to the respondents all land he might then be possessed of or might thereafter purchase in certain specified villages adjoining the Rilhena estate up to 1000 acres at a price and upon terms which need not be stated.

There prevails in Ceylon a system of registration of deeds, but agreement No. 693 was not registered, and was, in fact, incapable of registration, for the reason that it contained no sufficiently definite description of the lands affected by it.

This appeal relates only to certain blocks of lands, part of the 1000 acres acquired by the appellant Thornhill after considerable delay, in fact not until the year 1921, but in 1912 the respondents were, in anticipation of such acquisition, allowed by him to take and did take possession of such blocks of land, and have since been, and are now, in possession thereof.

Disputes arose between the appellant Thornhill and the respondents as to the mode of carrying into effect agreement No. 693, and a subsequent agreement was made modifying its terms in certain respects, and pending such disputes the said appellant executed in favour of the appellant Hall the transfer on the validity of which, as against the respondents, the question turns.

The transfer was dated October 25, 1923, and by it the appellant Thornhill, in consideration of Rs.45,624, stated to be paid to him by the vendor did sell, convey, transfer set over and assure unto the appellant Hall the lands in question described in the schedule to hold the same to him his heirs, executors, administrators and assigns absolutely. The deed was attested by a notary, who certified that of the consideration Rs.30,624 were acknowledged by the executant to have been received prior to the execution of the instrument, and

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for the residue Rs.15,000 a promissory note was granted by the vendor in favour of the executant.

This deed was, on October 29, 1923, duly registered at Ratnapura, and on May 13, 1924, the present action was instituted by the appellant Hall against the respondents. The appellant Thornhill was subsequently added as a defendant.

The defence raised two points material for the decision of this appeal: (1.) That having regard to s. 93 of the Trusts Ordinance No. 9 of 1917, the property comprised in the transfer was held by the appellant Hall for the benefit of the respondents to the extent necessary to give effect to agreement No. 693, and (2.) that failing this defence the transfer was fraudulent and collusive and conferred no title on the transferee as against the respondents claiming under the previous agreement 693.

The trial judge decided both points in favour of the respondents. In the Supreme Court the learned judges agreed with the trial judge on the first point, and, therefore, did not deal with the second, though they said they must not be held to dissent from the view of the judge thereon.

The first question is one solely of the construction of s. 93 of the Ordinance of 1917, which is in the following terms: "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition."

The trial judge and the Supreme Court found in fact that the appellant Hall acquired the property with notice of the existing contract No. 693, and that nothing had occurred to prevent specific performance of the contract, and they further held that on the true construction of the section the provision as to registration did not affect its application to the contract in question, inasmuch as the non-registration

thereof was due to the fact that it was not capable of registration.

The appellants did not, and, indeed, could not, before this Board raise again the questions dealt with by the concurrent findings of fact, and the question, therefore, is solely one as to the construction of the final words of the section.

On this point the Chief Justice said that in his view the object of the proviso was to secure compliance with the law as to registration, and that as the non-registration of the contract involved no breach of the registration law the proviso in such a case had no effect.

Their Lordships are unable to concur in this view. The prior registration of the contract is made a condition of the application to it of the benefit conferred by the section. The object in the mind of the legislature in imposing such a condition, even if it could be known, would not affect the meaning of the words used. Under these words it is plain that the contract is one which does not satisfy the condition upon which alone it is entitled to the benefit conferred by the section. If, therefore, the rights of the respondents depended on the Trusts Ordinance alone the appeal would succeed, and it is therefore necessary to consider the second question mentioned above. This turns on the proper construction and effect under the circumstances of this case of s. 17 of the Land Registration Ordinance of 1891 (No. 14 of 1891).

Sect. 17 is in the following terms : " Every deed, judgment, order or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order or other instrument, which shall have been duly registered as aforesaid. Provided, however, that fraud or collusion in obtaining such last-mentioned deed, judgment, order or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder, and that nothing herein contained shall be deemed to give any greater effect or different construction to any deed, judgment, order or other

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instrument registered in pursuance hereof, save the priority hereby conferred on it."

Prima facie, therefore, under the provisions of the first sentence, the agreement No. 693 would be void as against the appellant Hall claiming an adverse interest on valuable consideration by virtue of the subsequent registered conveyance of 1923. Moreover, it is admitted that according to decisions in Ceylon the mere fact that the appellant Hall had notice of the existence of the agreement would not affect his right to the priority given by the Ordinance. The question then is was there fraud or collusion on his part in obtaining the deed of 1923, or in securing its prior registration? If there was it would defeat his priority.

The District Judge said dealing with this point: "There is only one conclusion that I can come to after a careful perusal of the evidence on this point, and that is that the sale and purchase of these lands was a concerted device on the part of the added defendant to circumvent the company." It will be observed that this is a finding only that there was a concerted device on the part of Thornhill, but inasmuch as it appears from other parts of his judgment that he found the appellant to be practically in the same position as Thornhill so far as knowledge of what had happened and was being done was concerned, it is not unreasonable to infer that when the judge says the sale and purchase was a concerted device on the part of one he really means to involve the other party to the "concert." But in truth this point is not of much consequence. Facts emerged in reference to the transfer which show clearly, in their Lordships' opinion, that it was fraudulent and collusive in that it was not intended to be the out and out transfer to Hall which it professed to be. It is on the face of it a sale of the land out and out for a sum of money (Rs.45,624) paid to the vendor by the vendee. It is admitted that of the Rs.45,624 a sum of Rs.30,654 is the amount of a number of loans alleged to have been made at various times and in various amounts over a period extending from December 8, 1922, to October 17, 1923, and interest thereon. The evidence in support of the existence

of these loans is of the slightest description, and it is quite evident that the judge had difficulty in accepting even such evidence as there was, but, accepting the story as true, it shows a state of things utterly at variance with the transaction as it appears on the face of the deed. The transaction, so far as the Rs.30,624 were concerned, was not a sale for money thus paid as consideration for the transfer, but a transfer of land in consideration of moneys paid alio intuitu—namely, by way of loan by the purchaser to the vendor to be accepted, presumably, in satisfaction of the debt. As to the Rs.15,000 there is no evidence that it was ever paid. A promissory note was, as appears by the notary's certificate, given by the purchaser to the seller for the amount. This note has never been produced, in fact, it is said to have been torn up when later on the appellant Hall says he gave Thornhill a cheque for Rs.15,000 in payment of the note. No evidence of this except the bare statement of Hall was given. The cheque was not produced nor was any bank book or other evidence of payment. Their Lordships cannot but come to the conclusion that the whole transaction was a sham never intended to be anything more than a device for getting priority over the respondents' claim, and that this amounts to fraud or collusion within the meaning of the Ordinance.

For these reasons they are of opinion that this appeal fails, and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *O. A. Cayley.*

Solicitors for respondents: *Julius, Edwards & Julius.*

[PRIVY COUNCIL.]

J. C.* 1929 July 4.

CHEANG THYE PHIN . . . . . Appellant;

AND

LAM KIN SANG AND OTHERS . . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Trust—Limitation—Interest—Advances by Trustees—Claim against Trustees barred as to Principal—Liability for Interest—Interest accessory to Principal—Wilful Default—Debtor substituted for his Agent within statutory Period—Limitation Ordinance (No. 6 of 1896, Straits Settlements), Sch., art. 99.

The personal representative of persons interested in the income only of certain shares of a testator's estate, as to which he died intestate, obtained an order directing an account as from March 30, 1908, their claim as to income which accrued earlier being barred by the Straits Settlements Limitation Ordinance, 1896, Sch. art. 99. Before March 30, 1908, the trustees under the will had made unauthorized advances out of the trust income to the appellant and to another person, each of whom was a trustee, the appellant alone surviving at the date of the proceedings; in the case of the latter advance only there was a special contract to pay interest at a specified rate:—

Held, that in taking the account the appellant was not chargeable with interest upon the advance to himself, since no question of wilful default arose; the interest being a mere accessory to the principal, a claim to which was barred, the interest also was irrecoverable on the principle of *Hollis* v. *Palmer* (1836) 2 Bing. N. C. 713. But that that principle did not apply in the case of the other advance, as to which there was a special contract to pay interest; the trustees being under a duty to receive the interest as it fell due, it was chargeable against the appellant on the basis of wilful default.

Held, further, that an alteration made after March 30, 1908, in the books of the trustees, whereby the name of the principal debtor was substituted for the name of his agent, did not bring the debt within the period of accounting.

Judgment of the Supreme Court of the Straits Settlements varied.

Appeal (No. 110 of 1928) from a judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (February 16, 1928) varying a judgment of Sproule J.

The first respondent was the personal representative of two persons entitled to share in the income of a portion of

* *Present:* Viscount Sumner, Lord Warrington of Clyffe, and Lord Atkin.

the estate of Cheang Ah Quee, who died in 1901 domiciled in the Straits Settlements, as to which portion there was an intestacy. The appellant was the survivor of the executors and original trustees of the testator's estate.

The first respondent brought a suit against the appellant and others for administration of the testator's estate, and obtained therein an order, dated December 20, 1921, directing an account as from March 30, 1908, the plaintiff's right to share, so far as it accrued earlier, being barred by limitation.

The questions raised upon the present appeal were: (1.) whether the appellant was liable under the order of December 20, 1921, to be charged with interest upon certain advances made by the original trustees out of the trust income before March 30, 1908; and (2.) whether an alteration in the books of the trustees after March 30, 1908, whereby the name of the person to whom an advance had been made was substituted for the name of his agent, amounted to a renewal of the debt within the period of accounting.

The facts, and the effect of the judgments below, appear from the judgment of the Judicial Committee.

1929. June 3, 5. *Gavin Simonds K.C.* and *Greenland* for the appellant. A claim by the next of kin in respect of the advances was barred by the Limitation Ordinance, 1896, Sch. art. 99. The substitution of the name of Cheang Thye Cheong in the books of the trustees in place of that of his agent did not create or evidence a new debt so as to bring the advance within the statutory period. It is well settled law that when a claim to recover a sum is barred by limitation interest upon it, being merely accessory to the principal, cannot be recovered: *Hollis* v. *Palmer* (1); *Clark* v. *Alexander*. (2) The evidence as to the terms of the advance to Cheang Thye Cheong did not establish that there was an independent contract as to the interest any more than in the contract evidenced by a promissory note. There was no ground upon which punitive interest could properly be

(1) 2 Bing. N. C. 713.
(2) (1844) 13 L. J (C. P.) 133; 8 Scott, N. R. 147.

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charged in the account. The appellant was not a trustee for the next of kin, as they claimed against the will. [Reference was made also to *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh* (1); *Skene* v. *Cook* (2); and Limitation Ordinance, ss. 4, 10, and arts. 39, 45.]

The respondents did not appear.

July 4. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This appeal raises certain questions arising in the course of an action for the administration of the estate of one Cheang Ah Quee (hereinafter referred to as "the testator"), who died on December 13, 1901.

The plaintiff in the action is the legal personal representative of certain persons who were interested only in certain shares of the income of the testator's estate, as to which it has been determined that he died intestate. No part of the corpus of the estate has as yet become divisible, nor will the plaintiff in any event have an interest in the corpus.

The writ in the present action was issued on June 21, 1920. It claimed administration of the estate of the testator. The appellant (the first defendant in the action) was one of the executors and original trustees of the will. The other executors and original trustees are all dead and the appellant has now retired from the trusts. The present trustees are respondents to the appeal.

By his statement of claim the plaintiff alleged that the appellant and his co-trustees had committed serious devastavits and breaches of trust, and in particular the following, which alone are material to the present appeal—namely, that they had improperly advanced the following sums: (*a*) $50,703.36 to the appellant himself. (*b*) $61,315.76 to Cheang Thye Cheong, one of the original trustees, now deceased. (*c*) $86,380 to Chop Phin Kee, a business belonging to the appellant. (*d*) $50,000 to Chee Kok Peng.

The plaintiff claimed a declaration that the advances were breaches of trust or alternatively breaches of duty and acts

(1) [1922] 1 A. C. 120. (2) [1901] 2 K. B. 7, 14.

of wilful default, and claimed administration of the estate of the testator and the execution of the trusts of his will and all proper accounts and inquiries on the footing of wilful default.

The several defendants, amongst other defences, pleaded the Limitation Ordinance No. 6 of 1896, under which the period of limitation for a distributive share of the property of an intestate is twelve years from the time when the share becomes payable or deliverable.

For the purposes of the present suit the period has by common consent been taken to have commenced on March 30, 1908, being the day following March 29, 1908, twelve years prior to March 29, 1920, the date of the institution by the plaintiff of a suit since stayed or discontinued for the recovery of the shares to which he was entitled in the undisposed income of the testator's estate.

The present suit came on for hearing before Branch J. in the month of October, 1921. The decree therein was pronounced by him on December 20, 1921.

By this decree it was declared that the plaintiff was entitled to receive certain shares of income of the testator until the period for distribution of the corpus arrives or until further order. It contained, amongst others, the following declarations :—

" 4. That the plaintiff's claim to shares of the income of the movable and immovable property situate in Penang and of the movable property situate in Perak and in Hong Kong belonging to the estate of the testator accruing prior to March 30, 1908, is barred by limitation.

" 9. That the question whether the first, second and third defendants " (the original trustees) " have committed all or any of the acts of wilful default alleged in para. 20 of the statement of claim " (which included the making of the advances above mentioned and the alleged failure of the trustees to take steps to recover or call in the same), " be reserved for further consideration, but that the following accounts and enquiries be taken and made by the registrar or his deputy, and that the plaintiff be at liberty to surcharge

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on the footing of wilful default, and if it shall hereafter appear that any act of wilful default entitling the plaintiff to accounts on that basis have been committed, then the first, second and third defendants shall be chargeable on the footing of wilful default, but if it shall appear that none of the acts of wilful default alleged in the statement of claim have been committed, then the first, second and third defendants shall not be chargeable on the footing of wilful default."

Numerous accounts and inquiries were directed, but the only one material to the present question is the following—namely: "(*a*) An account as from March 30, 1908, of the receipts and payments in respect of the property (movable and immovable) in Penang and the movable property in Perak and Hong Kong (hereinafter called the trust funds), subject to the trusts of the will or passing under the intestacy of the testator."

The direction in para. 9 of this decree that the plaintiff shall be at liberty to surcharge on the footing of wilful default, although such wilful default had not then been established, is one of an unusual character, inasmuch as the liability of the accounting party is not determined by the result of the account. He may afterwards clear himself of the charge of wilful default, and surcharges made on that footing would then have to be disallowed. The decree, however, is binding on the parties and on the Court, and at the present stage surcharges made on the ground of wilful default would be properly allowed, although such default has not at present been proved.

Another point that has to be borne in mind is that the account is of receipts and payments as from March 30, 1908, and therefore no receipts or payments prior to that date are to be included.

On January 9, 1922, notice of the decree was given to persons interested in the estate not already parties, and on July 14, 1922, a classification order was made, regulating the attendance in chambers of those who had obtained liberty to attend. The various persons interested and having liberty to attend are respondents to the appeal, but none of them has

submitted a case or appeared before this Board, and the appeal is therefore ex parte.

The taking of the account (*a*) was in due course proceeded with by the registrar, and by an order dated October 10, 1924, made by Whitley J., it was ordered that the books of account kept by the clerks employed by the trustees should be taken as prima facie evidence of the actual sum paid and of the purposes for which it was paid, but not as evidence of the proper appropriation of any payment to capital account or to income account.

The plaintiff carried in a large number of surcharges, of which the following only need be mentioned for the purpose of the present appeal—namely, 21, 26, 27, 31, 11A, 12A, 16A. The last three items are for interest only.

The registrar allowed the surcharges 26, 11A, 31 and 16A in full, and in respect of 21–27 and 12A allowed the following sums—namely, $50,000, plus interest at 4 per cent. per annum from March 30, 1908, to June 30, 1909, and at the rate of 8 per cent. per annum from the latter date up to April 6, 1921.

The present appellant then issued a summons to vary the certificate by disallowing, amongst other sums: (*a*) $50,000, part of surcharge No. 26. (*b*) $50,000 in respect of surcharges Nos. 21 and 27. (*c*) $27,147.67, part of surcharge No. 31. (*d*) All interest under surcharge 12A. And by allowing interest at the rate of 3 per cent. only on $14,354.57, balance of surcharge No. 26, and $59,232.33, balance of surcharge No. 31, or so much of the said balances respectively as was owing in each year.

It is common ground that the sums sought to be disallowed under heads (*a*), (*b*) and (*c*) above mentioned all represented income of the testator's estate accrued before March 30, 1908.

The summons came before Sproule J. on July 16, 1927, who, by his order of that date, ordered that the certificate should be varied in, amongst others, the following particulars: (5.) As to surcharges Nos. 11A, 12A and 16A by allowing simple interest at the rate of 5 per cent. per annum only,

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and that in all other respects the certificate should be confirmed.

The present appellant then appealed to the Court of Appeal from the refusal of the learned judge further to vary the certificate as respects the items now in question. The appeal was heard on February 16, 1928, by a Court consisting of McCabe Reay, Deane and Dismore JJ., who by their order of that date allowed the appeal in so far as the sum of $50,000, part of surcharge No. 26, and the amount of $27,147.67, part of surcharge No. 31, were concerned, but in other respects dismissed the appeal.

The appellant then obtained from the Supreme Court of the Straits Settlements leave to appeal to His Majesty in Council from the order of the Court of Appeal, and in due course presented this appeal.

The appellant's case is that the surcharges 21 and 27, which admittedly refer to one matter only, ought to be disallowed altogether, and that, if this is right, then that it necessarily follows that surcharge 12A, which is for interest on the principal sum claimed by surcharges 21 and 27, should be disallowed also on the ground that, if the principal sum cannot be claimed, neither can any interest thereon be payable, interest, it is said, being merely an accessory to the principal. Then, as to surcharges 26 and 31, he contends that inasmuch as the Court of Appeal reduced the amount of the principal in each case by the sum representing advances made before March 30, 1908, they ought also to have correspondingly reduced the sum chargeable for interest and to have allowed interest only on the balances of the principal in each case.

Their Lordships will deal with this last-mentioned question first. The sums sought to be surcharged under items 26 and 31 were advances to the appellant himself or to his firm of Chop Phin Kee, and he is a debtor to the estate in respect of these sums, irrespective of his position as trustee. No question of wilful default arises. The position is simply one of debtor and creditor. The claim of the plaintiffs, except as regards sums advanced since March 30, 1908, has been held to be barred by the statute. It seems to their

Lordships to follow that there being no independent contract to pay interest, the interest is a mere accessory of the principal, and if the principal is irrecoverable so is the interest on it: see *Hollis* v. *Palmer*. (1)

The question as to the $50,000 under surcharges 21 and 27 and the interest thereon stands on a different footing. This was not an advance to the trustee as against whom the account is being taken, but to a third person, and the liability for it is that of a trustee who has made a payment not authorized by his trust. If it was paid away before March 30, 1908, he cannot now be charged with it at the instance of the plaintiff, and from an account taken under the order in the present case it must be excluded altogether. Their Lordships are of opinion that, as regards the principal sum, it was established, and Sproule J. accepted this view, that the $50,000 was originally—namely, before March 30, 1908, advanced to Cheang Thye Cheong, though in the name of his agent or attorney, Chee Kok Peng, and that the alteration subsequently to that date in the books by the transfer of the account into the name of Cheang Thye Cheong was not the record of a new debt, but merely the transfer of the old debt from the name of the agent to that of the principal, from whom it had been owing all along. If this is so, the sum was paid away before the crucial date and should be excluded from the account.

It does not follow, however, that in this case the interest on the sum in question should also be excluded. The interest is represented by the surcharge 12A. This sum was due, not from the trustee himself, but from the person to whom it had been advanced by the trustee, and it would appear from the evidence (record, p. 52, l. 17) that there was a special contract to pay interest at a specified rate. (2) This being the case, the principle that where interest is a mere accessory to the principal and a claim to the latter is barred by statute, the interest thereon cannot be recovered, does not apply.

(1) 2 Bing. N. C. 713.

(2) The reference is to an entry in the trustees' ledger as follows: "To loan secured by Thye Cheong, interest at 80 cts. p. m., $50,000."

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The trustee might have received the interest as it became due, and each such receipt after March 30, 1908, would have come into the present account. The account is to be on the footing of wilful default, and as it is prima facie the duty of the trustee to take steps to recover sums which should have been paid during the accounting period, he is properly charged with the interest on the $50,000 since March 30, 1908. It is true that he has been charged at a flat rate of 5 per cent. for the whole period, being less than the conventional rate of 80 cents per month, but as there is no cross-appeal on this point the judgment of the Court of Appeal cannot be disturbed.

For these reasons their Lordships are of opinion that the order of the Court of Appeal of the Supreme Court ought to be varied by disallowing surcharges 21 and 27, and so much of surcharges 11A and 16A respectively as represents interest on $50,000, part of surcharge 26, and $27,147.67, part of surcharge 31. In other respects the order appealed from should be affirmed.

The appellant should have his costs of this appeal out of the estate. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Nisbet, Drew & Loughborough.*

[PRIVY COUNCIL.]

BAKARE AJAKAIYE AND ANOTHER . . APPELLANTS;

AND

LIEUTENANT-GOVERNOR, SOUTHERN PROVINCES . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria—Title to Land—Island of Lagos—Land held under native Title—Failure to claim under Ordinance—Construction of Ordinance—Descriptive Title of Ordinance not exhaustive—Ikoyi Lands Ordinance (No. 16 of 1908, Southern Nigeria), s. 7.

The Ikoyi Lands Ordinance, 1908, of Southern Nigeria, which purports to be an Ordinance to provide for the proper identification and demarcation of lands granted by the Crown to private owners, and situated in a part of Lagos Island known as Ikoyi, provides by s. 7, that "all lands" so situated to which no claim was made under the Ordinance in the time thereby prescribed should be deemed to be Crown lands:—

Held, that the words "all lands" in s. 7 included lands held under a native title not acquired by or through any grant from the Crown. The above description of the purposes of the Ordinance did not purport to be exhaustive and could not prevail against the clear language of s. 7; further, s. 5 showed that one of the purposes was the demarcation of lands other than those granted by the Crown.

Commissioner of Lands v. *Oniru* (1912) 2 Nigeria L. R. 71 disapproved so far as it decided to the contrary.

Judgment of the Supreme Court of Nigeria affirmed.

APPEAL (No. 62 of 1928) from a judgment of the Supreme Court of Nigeria (January 26, 1928) affirming a judgment of Van der Meulen J. (June 10, 1926).

The two appellants, as "heads of Iga Iduntafa," claimed compensation under the Public Lands Acquisition Ordinance (cap. 88, Laws of Nigeria, 1923) in respect of land situated in that part of Lagos Island known as Ikoyi, and taken by the Government for a public purpose. They alleged that they were owners under a native title, not dependent upon, or acquired by or through any Crown grant.

* *Present:* VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE, and LORD ATKIN.

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The main question upon the appeal was whether s. 7 of the Ikoyi Lands Ordinance, No. 16 of 1908 of Southern Nigeria (and now cap. 91 of the Laws of Nigeria, 1923), applied, so that the land in question (as held by the Courts in Nigeria) was to be deemed to be Crown land.

The material provisions of the Ordinance, and the arguments upon the present appeal, appear from the judgment of the Judicial Committee.

1929. June 4. *Horace Douglas* for the appellants.
Gavin Simonds K.C. and *S. E. Pocock* for the respondent.

July 1. The judgment of their Lordships was delivered by

VISCOUNT SUMNER. In October, 1924, the Governor of the Colony and Protectorate of Nigeria, requiring for public purposes certain lands round the Okepa village Ikoyi, in the island of Lagos, took steps to acquire them under the Public Lands Acquisition Ordinance, and, in accordance with s. 5, gave public notice of his requirement. Thereupon the appellants, as "heads of Iga Iduntafa," lodged a claim in respect of the said lands, and in due course a summons was issued under s. 10, on which the respondent was plaintiff and the appellants were claimants and defendants. This came on for hearing before Van der Meulen J. in April, 1926. The claim was for an alleged right of ownership in the lands and for a share in the money to be paid by the respondent as compensation for the lands taken. The appellants claimed as owners not as inhabitants, but no doubt their alleged right was intended to be such as is described in the judgment of their Lordships' Board in *Amodu Tijani* v. *Secretary, Southern Nigeria* (1), and others besides themselves would have enjoyed usufructuary rights under them in accordance with local law and custom.

On the hearing of the summons the claim was met by a preliminary objection that the lands in question were conclusively deemed to be Crown lands by virtue of s. 7 of the

(1) [1921] 2 A. C. 399.

Ikoyi Lands Ordinance, 1908. If so, the alleged ownership could not avail the claimants. The objection was allowed by the learned judge, whose decision was sustained by the Full Court. Hence the present appeal, for which leave was given, has been brought before their Lordships' Board.

The question turns on the true construction of the Ikoyi Lands Ordinance, and particularly on s. 7. The matters, for which that Ordinance was intended to provide a remedy, are fully stated in the preamble. At the date of the ordinance much doubt existed as to the title to various lands in the island of Lagos, lying east of the Macgregor Canal therein, within which described limits the Okepa lands in dispute admittedly lie. By treaty, dated August 6, 1861, Docemo, King of Lagos, transferred to Her Majesty Queen Victoria his sovereign rights over the port and island of Lagos and in 1865 the fee simple in possession of the greater part of the portion situate to the east of the Macgregor Canal (generally known as "Ikoyi") was granted to the British Crown. In subsequent years the Crown made various grants of parts of this land, but by 1908 the position of the majority of the lands thus alienated was found to be insufficiently defined, all the more because the lands themselves had in many cases been deserted for years. Beside the lands which had been granted to the Crown there were private lands of smaller extent, and it had accordingly become desirable that the boundaries of all private lands, still occupied, should be defined, and that the areas of the Crown lands should be clearly ascertained.

The object of the Ordinance was to establish a procedure, under which matters could be cleared up once for all by an investigation of rights and titles, and a survey and demarcation of any area to which rights might be established. It is obvious that this involved calling on claimants to come forward and assert their claims, so that they might be investigated and determined. It is obvious also that cases might and would arise, in which claims, otherwise not unsubstantial, were either not asserted within the time limited (and some limitation was essential ut sit finis litium) or never

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asserted at all. It is obvious also that the land within the area named might involve questions of various sorts. Land might be (1.) in the possession of private persons, or (2.) included in Crown grants, or (3.) held under some title not originating in a grant from the Crown, and no doubt all such descriptions of land were in need of investigation for practical purposes.

Theoretically the area might have been classed as Crown lands and private lands, Crown lands including both such as were still in the hands of the Crown and such as had been granted away by the Crown, and private lands including such as were not King Docemo's to grant to the British Crown, whether because they had already fallen into private hands by grants from him or his predecessors prior to his transfers to Queen Victoria or because they had never been his at all, but, under native custom or otherwise, had belonged independently to private owners. Such a classification would, however, be purely theoretic unless it could be known that there actually were particular private lands owned under titles arising prior to 1861 and independently of the local Sovereigns. Historically, such a matter would be difficult to establish and, as a practical measure, the readiest road to a settlement would be to investigate all private claims and to demarcate all lands not private but remaining vested in the Crown, and the wording of the sections is strong to show that this practical course was adopted.

Sect. 2 runs : " All private persons claiming to be possessed of lands situated " in the part of the island of Lagos in question, " shall within twelve months exhibit their titles." These expressions are advisedly made general. The only qualifications upon " all persons " are that they shall be " private," and shall claim to be possessed, and the only way in which the lands are particularized is by their situation. Sect. 3 then deals not with all lands claimed by private persons, but with such of them as purport to be included in Crown grants. It says nothing of lands claimed, which do not so purport. Sects. 4 and 5 prescribe the course to be pursued with lands, in respect of which titles are exhibited to the Commissioner

under s. 2. Lands included in old Crown grants are to be resurveyed and new grants are to issue for them. Lands held under any title, other than Crown grants, are to be demarcated and recorded on plans kept for the purpose. Sect. 6 provides the requisite legal procedure in case of deficiency of prima facie proof of title or of conflicting claims, and then comes s. 7: "All lands situated within the limits above described to which no claim is made within the prescribed time shall be deemed to be Crown lands thenceforward."

In itself this section could hardly have been more explicit or clear. The lands, to which this appeal relates, were within the described limits and the prescribed time had elapsed without any claim to the ownership of them being put forward by the appellants or any other persons. Accordingly, both Courts below held themselves bound to deem them to be Crown lands, and it followed that they must dismiss the appellants' claim. Such an interpretation of words sufficient in themselves completes the scheme of the Ordinance, for it clears up all ambiguities of title. The two interests concerned are those of the Crown and of private persons. Private persons are called to "establish their titles," however arising. If they succeed, old Crown grants, if any, lapse, and are replaced by new and better defined grants. If they fail, the Crown's title arising from the cession is unchallenged and unchallengeable thereafter. If they do not come forward in time the title is deemed to be in the Crown, and any outstanding Crown grant, which might be inconsistent with it, lapses. Where private persons come forward and establish titles otherwise than by an original Crown grant, in which case they would be entitled to the demarcation which their new Crown grants would contain, their lands are finally demarcated for them in situ.

The present question is entirely one of construction of the Ordinance, and the appellants' argument may be summarized as follows: (1.) If the Ordinance applies to lands belonging to private persons under a native title, not dependent upon or acquired by or through any Crown grant, which is the

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title now asserted, the interpretation placed by the Courts upon s. 7 involves confiscation of property in a summary fashion without compensation. (2.) To avoid such a result, it is legitimate to consider, as materials for a proper construction, (*a*), the title, and (*b*), the preamble of the Ordinance on accepted principles of construction of statutes, and (*c*), the marginal summary of the contents of each clause, which is prescribed by cl. 27 of the Royal Instructions for Southern Nigeria of February 8, 1906. (1) Accordingly, as the Ordinance is described in the entitling part as " an Ordinance to provide for the proper identification and demarcation of lands granted by the Crown to private owners and situated, etc.," and as the marginal caption to s. 2 is " private owners to exhibit titles," the " private persons " mentioned in s. 2 must be identified as being such as are named in the title and description of the Ordinance, and so are exclusive of the appellants, whose claims are not to a title granted by the Crown. In support of this construction, reliance is placed on the apparent admission contained in the preamble that there was a part, though a minor part, of the portion of the island now in question, which never had been ceded to the Crown, and that the Crown had never purported to alienate the whole of that area. If so, when the Ordinance came into force, there remained private lands which, though dubiously delimited, were still occupied and had never been abandoned in the years intervening since the recited treaty was made with King Docemo. Reliance was placed on the authority of *Commissioner of Lands* v. *Oniru* (2), decided in 1912, and on a passage in the judgment of Combe C.J. in the present case, which said that " there were certainly two classes of persons who might claim to be owners of land to the east of the Macgregor Canal—namely, (*a*), the owners of that portion of the land which had not been granted to the Crown ; and (*b*), persons who had acquired title under Crown grants issued after 1865 in respect of land within the portion which had been granted to the Crown. These latter persons are

(1) See Laws of Southern Nigeria, 1908, vol. ii., pp. 1426, 1432.
(2) 2 Nigeria L. R. 71.

referred to in the Ordinance as 'private persons.' Provision was made in the Ordinance for determining the areas, which both classes of claimants were entitled to continue to hold as owners."

On the other hand the case of *Commissioner of Lands* v. *Kamajalodun* (1), decided in 1911, was set out and relied on in the judgment. It showed that, on the hearing and determination of the inhabitants' claim to fishing and other privileges in respect of the same parcels as those to which this appeal refers, not only was no adverse ownership claim set up, but the present appellants or their predecessors did not even appear or seek to be made parties, and it was assumed and expressly stated that the Crown had, without dispute and in the exercise of a right, which was apparently proprietary, permitted to the inhabitants the enjoyment of privileges, which it would only have been competent to proprietors to allow. A declaration was thereupon made in the presence of the Crown officers that the inhabitants were so entitled as of right, and that declaration still stood.

Their Lordships are unable to adopt the reasons or the conclusions of the appellants. It can only have been by inadvertence that the learned Chief Justice expressed himself as he did. If his words in themselves mean (which is by no means certain), that persons claiming as the appellants claim are not within some limited sense to be put upon the words "all private persons" in s. 2 of the Ordinance, they are inconsistent with the decision of the Court and must be rejected. The *Oniru* case (2) was not cited in the judgment appealed from and, probably for some reason not known to their Lordships, was not mentioned to the Court. At the same time, it had been so recently decided that it could hardly have failed to be in the recollection of the learned judges, and there may well have been some fact connected with it which, in the view of all parties, made it inapplicable. At any rate, it does not bind their Lordships, and as a decision adverse to the particular point of construction now in question, but not further or otherwise, they do not follow it.

(1) Unreported. (2) 2 Nigeria L. R. 71.

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As to the Ordinance itself, it is a misnomer to describe its operation in the sense adopted in the Courts below as "confiscation." No doubt in its effect, if parties concerned fail to assert in time a title which they might otherwise have established, they are divested of their property, but this is thanks to their own inaction. The same would have been the result of a statute of limitations or an ordinance making obligatory and effective a system of land registration and of proof of title by entries in the register. The Ordinance itself must have been notorious to those concerned, and the community within which possible claimants could be found must have been small. The opportunity for claims appears ample, but in any case this is a matter of policy, not of interpretation.

Their Lordships think that there is little need to resort to the title or to the preamble of the Ordinance in order to construe these clear sections. It is not contended that s. 7 of the Ordinance is "foreign to what the title of such Ordinance imports," so as to be ultra vires and void, as being prohibited by cl. 27 of the Instructions, but only that its limited terms affect, if they do not control, the construction of s. 7. As for the marginal captions, they are not to be taken to hold that the rules referred to are anything but directions as to the form to be adopted and the mechanical framework to be used in drafting Ordinances, but in any case the caption here carries matters no further. It does not purport to refer to the wording of the title and description of the Ordinance for any purpose of limiting or construing the words "any private persons." The title of the Ordinance itself, "Ikoyi Lands Ordinance," is quite general, and the following words—"proper identification and demarcation of lands granted by the Crown to private owners"—are descriptive of the major part of the purposes of the Ordinance, but do not purport to be exhaustive of them. Accordingly, they cannot prevail against the enacting words. Sect. 5 quite clearly and in terms deals with demarcation of lands, other than such as have been granted by the Crown. This section certainly cannot be expunged or modified by the words contained in

the title and description of the Ordinance. The same holds good of s. 2. The contention that " exhibit their titles " in the latter section assists the argument or operates to limit the " private persons " to grantees from the Crown is unsound, for the expression is quite general. The title is not defined, nor is the expression " exhibit " limited, and, for anything that appears to the contrary, it is a fit expression to cover not only written instruments but all the indicia or symbols of right that occur in such a community as that of Lagos. As for the preamble, it appears to their Lordships to go far to establish a situation, in which the exclusion from the operation of the sections of any persons interested in any way in lands within the area, would have tended to defeat the object of the Ordinance, and would, for no good purpose, have perpetuated the uncertainty and confusion, which so urgently demanded an effective remedy.

Their Lordships will for these reasons humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Oldfields.*
Solicitors for respondent: *Burchells.*

END OF VOL. AND OF APPELLATE SERIES FOR 1929.

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

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